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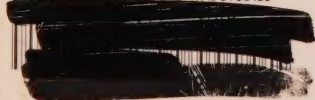
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Prepared for the Pest
Management Advisory Board
by H. Wade MacLauchlan
September 9, 1986

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ABSTRACT

The present regulatory scheme for the registration of pesticides in Canada has been in place since 1972. Until recently, the process has been carried on in a relatively uncontroversial fashion under the authority of the Minister of Agriculture, with effective decisionmaking being vested in a group of officials now constituted as the Pesticides Directorate of Agriculture Canada. Decisionmaking has been in a Ministerial, non-judicial mode. In 1985, when the Minister of Agriculture cancelled the registration of alachlor, a widely used agricultural herbicide suspected of being a human carcinogen, the process shifted from the Ministerial/departamental mode to a full-blown, judicial-type hearing before an ad hoc Review Board appointed by the Minister of Agriculture. This was only the third time in fifteen years that such a Review Board was constituted. The experience with the alachlor suspension and review has convinced many that the existing process needs to be reconsidered.

The scheme created pursuant to the Pest Control Products Regulations gives rise to two principal problems. First, there is the problem of vagueness. Neither the Act nor the Regulations clearly establishes a standard to be applied or a methodology to be followed in deciding upon the registration, subsequent suspension or cancellation of a pesticide. Second, the decisionmaking scheme combines an initial Ministerial/-departamental decision with a quasi-judicial Review Board. The Board is appointed by the Minister and acts in a strictly advisory capacity, with the ultimate decision being that of the Minister. This awkward institutional relationship is the source of many potential legal problems.

There are deep controversies involved in pesticides registration: controversies about risk to public health and the environment, controversies about important economic interests, and controversies about participation in decisionmaking. All of these run close to the surface in any discussion of legal issues relating to the legislative and administrative scheme. This paper does not fully represent, and certainly does not resolve, this range of controversy. The paper is about administrative law, about statutory and regulatory coherence, and about procedures which the law requires for decisionmaking. The paper is developed in the expectation that, once interested parties are apprised of the legal issues, they can engage in a better defined debate about what they really want from the process.

It has long been accepted in Administrative Law that a Ministerial decision is not held to the same standard of procedural scrutiny as are judicial or quasi-judicial decisions, such as those made by labour relations or immigration appeal boards. Ministers now bear a duty to act with procedural fairness toward those affected by their decisions, at least

toward those most seriously affected. In the case of the Minister of Agriculture deciding on pesticides registration and re-evaluation, the procedural obligations of the Minister are made more complex by the existence of Review Boards.

So long as the matter is one between the applicant/registrant and the Minister, it can be kept relatively informal. For example, it is part of the ongoing process for the registration and re-evaluation of pesticides that the Minister consults with the staff of Agriculture Canada, with other Ministries such as Health and Welfare or Environment, and even with provincial Ministers. In dealing with the alachlor case the Minister found that, after receiving the report of a Review Board, he became subject to new obligations to disclose any consultations or submissions to the registrant, and perhaps to other parties, and to afford an opportunity to respond.

The introduction of Review Boards also raise potential problems of bias. First there is the fact that the Minister, according to the Regulations, selects the Board members, even though it is his decision that is under review. Furthermore, the Minister is involved at several stages of the process. He makes the initial decision to register, suspend or cancel; he the appears through counsel before the Review Board to take a position adverse to the registrant/applicant; finally, he has to receive the Review Board report and decide what action to take. This multiplicity of roles would never be tolerated if the Minister were a judicial or quasi-judicial decisionmaker.

There are also concerns about the extent to which the Minister may rely upon departmental staff and upon the advice of other departments and governments. There are concerns about the extent to which the Minister may, or must, consider the views of interested groups such as users, competitors, and environmentalists.

Out of all these concerns comes the conclusion that Ministerial decisionmaking ought not to be combined with quasi-judicial review by a Review Board which reports in the form of advice to the Minister. There are too many potential legal problems. Administratively, the two processes are like ships passing in the night.

There are at least two possible solutions to this problem. The first is to take the decision away from the Minister entirely and create an independent agency to handle all matters of registration and re-evaluation of pesticides. The second is to abolish the Review Boards and leave the decision essentially as a Ministerial one. A third option might be to maintain the status quo; however this is not a viable solution since the Review Boards are the source of many serious legal problems while they are, in the overall scheme of Canadian pesticide registration, barely relevant.

Creating an independent agency has the advantage of greater openness, and some might say independence. The major drawbacks are the cost of participation and the potential for parties to protract matters for strategic reasons through legal wrangling. There may also be the loss of the advantage of the informal consultation that currently takes place at the Ministerial level.

As for leaving everything with the Minister, it will only be viable if there is a greater opportunity to consult with all parties interested in pest management issues, including pesticide manufacturers, user groups, and public interest groups concerned about health and environmental issues. It is more important that such consultation focus on the development of policy, rather than upon deciding individual cases. Of course, from the perspective of the registrant/applicant there must be full consultation with Departmental officials on a case-by-case basis. If the Ministerial option is pursued, there must be a commitment to consult and to be open, in both policy development and individual decisions.

There are obviously advantages and disadvantages to either option. The weighing of these respective advantages and disadvantages should be left to the parties, who have had recent experience with the adjudicative/adversarial model of decisionmaking during the alachlor proceedings. There are several questions that all parties ought to address:

- i) Does an outside review provide a reliable check on the scientific basis for a departmental decision?
- ii) Does an outside review or some similar process (e.g., an independent administrative agency) provide an effective and efficient forum for participation in decisionmaking?
- iii) Is an outside review needed as a check on the legality or the fairness of departmental action?
- iv) Are there alternative means of attaining the perceived advantages of Review Boards? These include improved Ministerial decisionmaking, outside consultative bodies (e.g. PMAB), and/or Federal Court review.

In the end there are no easy solution. There are strongly opposed interests and a great deal at stake in decisionmaking about pesticides. Parties will take strategic positions on the question of the appropriate process. Somewhere among all of these views someone must determine the public interest. The solution must be one that is effective, efficient, and fair. Hopefully such a solution will begin to emerge from this report and reaction to it.

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INTRODUCTION

The present regulatory scheme for the registration of pesticides in Canada has been in place since 1972. Until recently, the process of registration and re-evaluation of pest control products has been carried on in a relatively uncontroversial fashion under the authority of the Minister of Agriculture, with effective decision-making being vested in a group of officials now constituted as the Pesticides Directorate of Agriculture Canada. Decision-making has been in a Ministerial, non-judicial mode. In 1985, when the Minister of Agriculture cancelled the registration of Alachlor, a widely used agriculture herbicide suspected of being a human carcinogen, the process shifted radically from the Ministerial/departmental mode to a full-blown, judicial-type hearing before an ad hoc Review Board appointed by the Minister of Agriculture. This was only the second time in fifteen years that such a Review Board was constituted. Two legal challenges were successfully undertaken against the Minister regarding issues of interpretation or of procedures adopted. Several further challenges to the Review Board or the Minister were threatened. And all of this occurred only in relation to the initial question of the extension of temporary registration of Alachlor.

It is undoubtedly the experience with the Alachlor review which has promoted new interest in the process of pesticide registration and which had prompted this Report. Specifically the purpose of this Report is to conduct a "legal analysis" of the scheme for the registration, cancellation or suspension of pest control products and for the review of those decisions. The analysis deals with problems of interpretation in the Pest Control Product Regulations, particularly in sections 17 to 25, and with related procedural problems. In terms of volume, it will be the procedural problems which receive most attention in this Report.

To say that the process of pesticide registration and reevaluation has been relatively uncontroversial until the Alachlor episode is to disclose the bias of an administrative lawyer, and to reveal the focus of this Report. It is undeniable that there are deep controversies involved in pesticide registration. Controversies about risk to public health and the environment, controversies about economic well-being, and debates about participation in decision-making run close to the surface in discussion of legal issues. The subject is scientifically complex and politically charged. This paper does not hold itself out as fully representing, and certainly not as resolving, this range of controversy. It is a paper about administrative law, about statutory and regulatory coherence, about procedures which the "law" will require for such decision-making.

No apologies are made for not resolving all of the difficult issues, for the law alone cannot resolve them. However, once interested parties are apprised of the legal issues, they can engage in a better defined debate about what they really want from the process. To give an example, this Report will ultimately take the position that a trial-type proceeding, complete with legal counsel and cross-examination, is not particularly useful for the resolution of complex questions of science and economics, especially where, in the normal course of events, the necessary information and data are generated over an extended period of time through a demand-response process between government and the industry.

It is now for parties who have had the experience of both the temporary hearings and the full hearings of the Alachlor Review Board, and/or who have spent years dealing, from the perspective of government, industry or public interest groups, with the pesticide registration process, to react to this Report. Is cross-examination useful for the resolution of these issues? What is

the purpose in having an independent review board? Does it make sense for the Board to engage in a formal proceeding and then report to the Minister who decides on a broadly discretionary basis? What is the appropriate role for the public? What can they contribute? Do lawyers assist the process?

These are some, but by no means all, of the questions which must be asked as the debate about appropriate procedures continues. This Report will add some focus to that debate by elaborating the legal issues which have arisen or are likely to arise. The following quotation from the concluding chapter of this Report provides a summary of the context in which that debate will occur:

The pesticide registration process in Canada is at a critical turning point. At the same time as a new initiative in consultation and policy development is being undertaken, the considerable shortcomings of a formal commitment to a judicial-type resolution of hard cases, on an ad hoc and infrequent basis, are being demonstrated. As a further coincidence, new demands for procedural justice in administrative decision-making are being positively received by reviewing courts, either on common law or constitutional grounds.

This Report will ultimately recommend in favour of the abolition of Review Boards as an element of the process of pesticide registration. However, it will also caution that such abolition can only take place in a context where the registrant applicant is given a meaningful final opportunity to be heard by the Department and where users and public interest groups are permitted to participate fully in, and to be better informed about, the process through the innovative development of options for consultation and participation in policy development.

CHAPTER I: THE EXISTING REGIME AND AN ANALYSIS OF THE REGULATORY SCHEME

The first Chapter of this Report will begin with a description of the various responsibilities for the regulation of pest control products in Canada. However the principal task is to describe and analyze the regulatory scheme, administered by Agriculture Canada, which governs the registration of pesticides. The scheme has been in place for fifteen years and officials responsible for its administration have managed it valiantly despite a hopelessly vague and often confusing mandate. The recent experience of the cancellation of the registration of alachlor, a pre-emergent plant herbicide distributed in Canada by Monsanto Inc., has brought to the fore many of the ambiguities and contradictions of that regulatory scheme. It has also underscored how important it is to amend or remedy these problems. There is a great deal at stake, both in terms of commercial interest and public interest, in the pesticide registration process; and the alachlor saga has demonstrated that parties are willing to pursue those interests through judicial review and that reviewing judges are receptive.

This Chapter will identify the problems disclosed by the alachlor experience and will undertake an analysis of the statutory and regulatory schemes. Specific recommendations will not be made until Chapter III, after related procedural issues have been considered in Chapter II.

A. An overview of the legislative and administrative arrangements governing pesticides:

(1) Federal and Provincial Roles

The Constitution Act, 1867, defines the scope of valid federal and provincial legislative power, and can be interpreted to confer jurisdiction over the regulation of pesticides to both levels of government.

Both the provinces and Ottawa can rely on s.95 of the Act which provides for concurrent federal and provincial legislative authority over agriculture. Provinces may augment their s.95 authority over pesticides with their authority over public lands belonging to the province¹, property and civil rights in the province², matters of a merely local or private nature³ and local works or undertakings⁴. The federal presence in pesticide regulation can be supported by its criminal law⁵ and trade and commerce power⁶, as well as by its power to make laws for the peace order and good government of Canada⁷.

The difference in emphasis found in provincial and federal legislation governing pesticides is well summarized in the following quotation:

In general, it may be said that the jurisdiction over pesticides divides between federal registration, classification and labelling of such products ... and provincial control over their actual use through licenses, permits and related regulatory techniques."⁸

Although the above quotation accurately reflects the legislative orientation of the two levels of government, it would be a mistake to think that, for example, provincial governments play no role in the registration process set out in federal law. Though the enactment and administration of laws dealing with the registration of pest control products is a federal responsibility, the provinces play a role in the registration process by providing information to assist Agriculture Canada during both the pre-registration (application) and post-registration (monitoring) phases. [Indeed, the Salter report has recommended an increased provincial contribution to the current registration process.⁹]

Thus, although the focus of federal and provincial pesticides legislation differs considerably, there is administrative interaction through the assistance given in the implementation of their respective schemes and in the exchange of

information through channels such as CAPCO (see below under committees).

(2) Federal Departmental Responsibilities

In addition to the Federal/Provincial distribution of regulatory responsibility, there is a further division of regulatory responsibility within each sphere. For example, the constitutional heads of power from which the federal government derives its power over pesticides finds expression in many federal enactments administered by a number of government departments.

The Pest Control Products Act (PCPA)¹⁰ and the Pest Control Products Regulations (PCPR)¹¹ [administered by Agriculture Canada] comprise the only federal enactments aimed directly at the regulation of pesticides. However, the Food and Drugs Act¹² [Health & Welfare] establishes a maximum permissible residue limit of an 'agricultural chemical' (defined to include pesticides) in food.

Other acts that limit the use of pesticides [together with the agencies charged with their administration] include: the Environmental Contaminants Act¹³ [Environment Canada]; Fisheries Act¹⁴ [Fisheries & Oceans]; Ocean Dumping Control Act¹⁵, Canada Water Act¹⁶ and Migratory Birds Convention Act¹⁷ [Environment Canada]; Arctic Waters Pollution Prevention Act¹⁸ [Department of Indian and Northern Affairs]; Transportation of Dangerous Goods Act¹⁹ [Transport Canada].

The nature of the responsibilities given to these various Departments under the Acts cited above involve these departments in the pest control product registration process overseen by Agriculture Canada as a matter of administrative practice.²⁰

(3) Committees

A number of committees play a role in the regulation of pesticides by

offering expert advice in a variety of subject areas²¹ and by promoting the exchange of information between various agencies within each level of government, and between industry and the provincial and federal governments. The focus of this study requires that only two of these committees be specially noted.

The Federal Interdepartmental Committee on Pesticides (FICP) consists of representatives of those federal departments with a direct or indirect interest in pesticides. Members are appointed by Cabinet and the committee reports to Agriculture Canada. The committee performs a number of functions including an annual review of federal projects involving pesticide use. The committee's recommendations on policy issues influence the administration of the PCPA.

There also exists a committee to facilitate information flow between the federal and provincial governments and to ensure the co-ordination of federal and provincial efforts in pesticide regulation. The Canadian Association of Pesticide Control Officials (CAPCO) is made up of representatives from each of the provinces and territories, Agriculture Canada, Environment Canada, and Health and Welfare Canada. Representatives from other agencies and associations may also be appointed by the Associations's executive council.

This concludes a brief summary of the legal and administrative arrangements affecting pesticides, and the report will now turn to providing an outline of the PCPA and PCPR.

B. The PCPA, PCPR and Registration

The above discussion has demonstrated the array of statutory regimes and administrative actors involved in various aspects of the regulation of pesticides in Canada. What needs to be underscored at this point however is that the PCPA and the PCPR constitute the most important of these regulatory regimes and the

principal authority regarding the registration of pesticides in Canada. What needs to be further underscored is that it is the Minister of Agriculture, acting on the advice of key personnel in the Pesticides Directorate of Agriculture Canada, who is ultimately responsible for the administration and the application of the PCPA and PCPR. It is this statutory scheme and specifically the ministerial power to approve, cancel or suspend the registration of a pest control which is the focus of this study.

This part of the Report will be a bird's eye view of the process of registration. It will be followed by an exposition of the recent experience with the cancellation of the registration of alachlor, which is undeniably the reason why this study has been undertaken in the first place. The final part of this Chapter will be an analysis of some interpretive problems arising from the legislative and regulatory provisions of the PCPA and PCPR.

In undertaking to outline the process, it is recognized that this Report is not a study of the administrative efficiency of the existing process of pesticide registration. The purpose of this Report is a legal analysis of the possibilities for procedural reform and a critical assessment of the present procedures and statutory provisions. It is expected that there will be many persons who read this "legal" analysis who are much more familiar with the day-to-day operation of the registration process than is the author of this Report. Accordingly this outline of the process serves two purposes: to orient readers who are not familiar with the registration process to the basic operation of the scheme; and, to establish the assumptions about the existing process which are made in the Report.

(1) Application; Registration; Temporary Registration; and Refusal to Register

S.4(1) of the PCPA and s.6(1) of the PCPR require that every control product imported into or sold in Canada must be registered in accordance with the PCPR. The decision to register is that of the Minister of Agriculture and the Minister may refuse registration if "in his opinion" the product does not have merit or value for its claimed purposes, or if the product creates an unacceptable risk of harm to things on or in relation to which the product is intended to be used or to public health, plants, animals or the environment. The Minister may also refuse registration of the information provided in the application is insufficient to enable the control product to be assessed or evaluated. There are a number of observations which need to be made about this process. First, the obligation to generate information is upon the registrant/applicant. Second, if the available information is not adequate, the registration may be refused. Indeed a key official in the Pesticides Directorate of Agriculture Canada has recently said that registration process has traditionally operated on the principle of "guilty until proven innocent".²² Third, the information to be generated is scientifically complex and expensive. Guidelines established by the Pesticides Directorate and its predecessor, the Pesticides Division of the Plant Health and Plant Products Directorate of Agriculture Canada²³, require the development of a data package dealing with detailed product chemistry, product performance, occupational exposure, effect on non-target organisms, and residues. Fourth, it takes time to generate sufficient information to satisfy the relevant criteria for full registration. The registration guidelines prepared by Agriculture Canada make no representations as to the typical duration of the process. They do advise, however, that applications "should be submitted as far as possible in advance of the desired registration date".²⁴ One industry

spokesperson estimates that developing the data which regulatory authorities require as a condition for registration can take as long as ten years and the cost may amount to some \$20 million.²⁵ Another industry group estimates that the average turnaround time in the registration process is 800 days.²⁶ One thing which is clear is that the state of the art in scientific assessment of pest control products has advanced significantly in recent years so that the calibre of information required and the capacity to assess it has become much more sophisticated. A fifth observation about the process is that the standards set out in the PCPR are extremely vague, and the PCPA is effectively silent. Hence the responsible officials in Agriculture Canada have sought to further define the relevant standards by means of registration guidelines and trade memoranda.²⁷

Thus it can be seen that the process is essentially one of information generation and assessment. The information is technical, so technical that Agriculture Canada, rather than develop its own toxicological expertise, has "retained" the services of the Health Protection Branch of Health and Welfare Canada to conduct toxicological assessments. Also consulted are the Department of the Environment and Fisheries and Oceans Canada²⁸ and there is a growing practice of consultation with interested provincial government officials.²⁹ Public interest and user groups have not traditionally had an explicit involvement in the process but, as a consequence of recommendations made by the Salter Report, some steps have been taken to provide improved information regarding the data base and to permit opportunities for input. In two words, those of S. W. Ormrod of the Pesticides Directorate, the pesticide registration process involves a "team approach".³⁰

To summarize the process of registration, it is based on sophisticated technical data but it ultimately involves a question of judgement. The

generation of the technical data is complex and technical; it involves a good deal of back-and-forth between government officials and the applicant. It involves much consultation with interested governmental and public constituencies. All of this will serve to set the stage for a consideration, later in this Report, of the appropriate procedural requirements which ought to be imposed on the process and of the more basic question of how to characterize the ministerial decision.

In addition to the power of the Minister to register a pest control product, or to refuse, suspend or cancel registration, it should be noted that there are intermediate steps short of full registration. Pursuant to s.5(b) of the PCPR an exemption may be granted to conduct research under limited conditions. Also, if it is necessary for the development of further information or to deal with an emergency infestation, a temporary permit may be granted pursuant to s.17.

Should the Minister decide to register the product, registration for 5 years is normally granted, and where the time period is not specified in the certificate of registration, s.14(1) states that registration may be granted for a maximum of five years. Should the Minister refuse to register a control product, notice of his decision together with his reasons for refusal must be given to the registrant.[s.21(a)]

Refusal to register (or to temporarily register --see Alachlor summary following this section of the report) a product gives the applicant the right to request a review of the Minister's decision. Review procedures will be outlined below.

(2) Post-registration: Reevaluation, Suspension and Cancellation

Once registration is granted, the Minister has the power to suspend or

cancel registration (on any terms or conditions he may specify) when, on the basis of "current information available to him, the safety of the control product or its merit or value of its intended purposes is no longer acceptable to him".(s.20).

Sources of such information include research by academic institutions, provincial government agencies, the federal agencies mentioned above, or studies conducted by Agriculture Canada, which may conduct a reevaluation program of registered products. The evolving sophistication of the process of monitoring control products after they are registered is underscored by the following comment made by the Associate Director of the Food Production and Inspection Branch of Agriculture Canada in 1982:

Requirements have changed so drastically in recent years that even products registered five years ago would probably not make it through the current review process.³¹

In addition to the information provided by the sources noted above, s.19 authorizes the Minister to request information from the applicant:

Cancellation and Suspension of Registration

19. During the period of registration of a control product, the registrant shall, when requested to do so by the Minister, satisfy the Minister that the availability of the control product will not lead to an unacceptable risk of harm to

- (a) things on or in relation to which the control product is intended to be used; or
- (b) public health, plants, animals or the environment.

Though s.19 may thus be used before s.20 cancellation or suspension, it is not a necessary preliminary to the exercise of s.20 powers.

As in the case of refusal to register, the Minister must give official notice of, and reasons for, the suspension or cancellation to the registrant s.21(b). The decision also gives the registrant review rights identical to those of an applicant refused registration. The review process will now be considered.

(3) The Review Process

The applicant or registrant who receives official notice of the Minister's decision to refuse, cancel, or suspend registration has 30 days to apply in writing to the Minister for a hearing, describing the matters that the applicant/registrant intends to raise. [s.23] Upon receipt of the application for a hearing, the Minister must appoint a Review Board and refer the subject matter of the application to the Board. [s.24]

The Board, which must consist of at least three people, then holds an inquiry into the subject matter of the application and must give the person who applied for the hearing "and all other parties that may be affected by the subject matter of the hearing an opportunity to make representations to the Board at the hearing" [s.25(1)]. Upon completion of its inquiry, the Board forwards its recommendations and reasons to the Minister [s.25(2)], who, after considering the Board's report, may take such action as he deems advisable [s.25(3)].

C. The Alachlor Experience

The recent events surrounding the cancellation of registration for Alachlor serve to illustrate shortcomings in the registration and review process. A detailed account will thus form a convenient link between the outline of the registration process just presented and the subsequent analysis of the PCPA and PCPR.

On February 5, 1985, the Minister of Agriculture, acting on information provided by Health and Welfare Canada (i.e. "current information available to him"—s.20 of PCPR) cancelled registration for Alachlor products. The cancellation powers of the Minister in s.20 [all section references are to PCPR] allow him to cancel registration on "any terms and conditions he may specify".

In this case, the accompanying terms included the granting of temporary registration for limited applications of Alachlor until Dec.31, 1985.

The Minister's power to grant temporary registration in s.17 can also be made on "any terms and conditions he may specify". The accompanying terms of the grant of temporary registration included revised labeling, commitments by Monsanto to provide additional data, and Monsanto's co-operation in the implementation of a special hazard advisory program to all potential users.

Upon receiving notice of the cancellation decision, Monsanto exercised its s.23 rights and sent a letter to the Minister requesting a hearing. In accordance with s.23, Monsanto's letter contained notice of nine issues it intended to raise before the review Board. The letter also included a request for an extension of temporary registration for the duration of the review process. Monsanto did not receive a reply to this request.

Monsanto, concerned that their temporary registration of Alachlor was to expire in less than two months, requested an extension of their temporary registration in October, 1985. This request also yielded no response.

On November 13, 1985, the Minister fulfilled his s.24 obligation to appoint a Review Board. Monsanto wrote to the Minister on the same day requesting that he refer the issue of temporary registration to the board as "one of their first orders of business"³².

Monsanto then attempted to raise the matter of refusal of extension of temporary registration at a preliminary meeting of the Review Board held on December 5, 1985. The Board, however, declined to consider the issue stating it did not have the authority "either to determine or make recommendations"³³ on the temporary registration issue.

Eight days after the preliminary meeting, Monsanto received a response to

their October and November requests for extension of temporary registration. The letter indicated that the Minister would not take any action to alter the expiry date (Dec. 31, '85).

Monsanto treated the Minister's response as a 'refusal to register' under s.21(a). The company thus attempted to invoke s.23 for a second time, in this instance requesting that the refusal of temporary registration be referred to the review board. The Minister refused. Monsanto then sought and won an order of mandamus from Cullen J. of the Federal Court Trial Division directing the Minister to refer to the review board the refusal of "temporary or other registration of its Alachlor products".³⁴

Cullen J. agreed with Monsanto's contention that the reference to temporary registration in the letter which requested the first review board was sufficient indication that the company intended to raise the issue of temporary registration before the board. He also held that the refusal of extension of temporary registration fell within s.21(a)'s reference to "refusal to register". Cullen J. therefore concluded that s.23 rights of review attached to the Minister's decision on the temporary registration issue:

The applicant [Monsanto] was quite correct to treat the Minister's letters as an action under section 21 of the Regulations, and so to move pursuant to s.23 of the said Regulations.³⁵

[Cullen J.'s judgment addresses, in part, a major interpretive problem in the regulations: the relation of temporary registration to the application, refusal, suspension, cancellation, and review provisions of the PCPR. This problem is dealt with in Part D of this chapter.]

The Minister accordingly referred the matter to the Alachlor Review Board. The Board set aside the issue of 'permanent' registration until July 1986, and dealt solely with the temporary registration issue in order to allow a

recommendation to be made to the Minister prior to 1986 spring planting.

Hearings began on February 17, 1986 and lasted for five days. s.25(1) of the PCPR requires that a Review Board give "the person who applied for the hearing and all other persons who may be affected by the subject matter of the hearing" an opportunity to appear before the Board. Parties at the Alachlor hearings, apart from Monsanto and the Minister of Agriculture, included: the Minister of Health and Welfare Canada; the Ontario Ministries of Agriculture and Food, Environment, Health, and Labour; Ciba-Geigy Canada (a Monsanto competitor); the Canadian Agricultural Chemicals Association; Friends of the Earth; Pollution Probe; Zulma Van Engelen (an Ontario resident alleging contamination of well water by Alachlor); and the Ontario Corn Producers' Association.³⁶

Procedures adopted by the Board permitted representation by counsel, the examination and cross-examination of witnesses, counsel for Monsanto and the Minister of Agriculture were given an opportunity for rebuttal argument.³⁷

On February 26, 1986, nine days after it began hearings, the Board submitted a recommendation to the Minister that Alachlor's temporary registration be extended to December 31, 1986, or until the Minister reached a decision on the Review Board's report on the non-temporary registration issue, whichever came first.

In its Report the Board based its recommendation upon its own "worst case" risk-benefit analysis over a one-year period based upon limited data, primarily a United States E.P.A. position document. The Board's Report was immediately criticized by public interest groups which had participated in the hearings. The Board was charged with having answered a question which was not before it on the basis of very scanty evidence and with referring to material not on the record.³⁸ On March 12, an action was commenced in Federal Court by the public interest

representatives seeking to prohibit the Minister from acting on the recommendation.³⁹ On the same day, Monsanto sought a writ of mandamus ordering the Minister to act on the Review Board's recommendation.⁴⁰ On March 24, the Review Board submitted a Supplementary Report acknowledging certain minor errors in its Report of February 26 and defending its reliance upon data available "in the public domain" in arriving at its recommendations.⁴¹ In any event, its advice of February 26 was not changed.

The Minister, after having read the Board's Reports, exercised his prerogative under s.25(3) of the PCPR and affirmed his decision to not extend Alachlor's temporary registration. However, in his letter to Monsanto, the Minister disclosed that his decision was based, in part, on

advice received subsequent to the Board's report from Health and Welfare Canada and the Ministers of the Environment from the provinces in which it is primarily used.⁴²

Both the action for prohibition and the one for mandamus were discontinued on March 27, the day after the Minister's decision. But Monsanto succeeded in securing certiorari to quash the Minister's decision. Collier J. of the Federal Court Trial Division held that, although s.25(3) of the PCPR enabled the Minister to go beyond the report, further procedural obligations were imposed as part of the ministerial duty of fairness.

Once the Minister decided to go beyond the report, and take into account other material not before the Board, then there was a duty to inform Monsanto, and perhaps others, and to afford an opportunity of response.⁴³

The Minister then wrote the parties, informing them of his post-Review Board consultations, and invited submissions or comments. Copies of letters from the Minister of Health and Welfare Canada and the Ministers of the Environment for the Provinces of Quebec and Ontario were enclosed.⁴⁴ On May 5, he wrote to Monsanto, with copies to other participants, informing the company that nothing

had been added to the information upon which the earlier decision had been based and that temporary registration would not be renewed for 1986.

The saga goes on as the Review Board recommenced its hearings upon the issue of alachlor's permanent registration in July of 1986.

There are a number of observations to be drawn from this extended recounting of the experience which has been had with the alachlor review board. The first observation is that such review boards are not an everyday phenomenon in the process of registering pest control products. In fact this is only the second time in the fifteen year history of the PCPR that a Board has even been constituted.⁴⁵ The second observation is that there are many questions of interpretation arising from the ambiguous language and scheme of the PCPA and PCPR. Third, parties affected by these decisions have a sufficient stake, either financial or political, to seek judicial review if a plausible basis for such review appears to be available. Fourth, reviewing judges are apparently amenable to scrutinizing the process. Fifth, there are many issues regarding the required procedures which have been raised in this case and there are further issues which can now be foreseen.

It is the alachlor experience which has prompted this Report. There is a level of confusion over procedures and the interpretation of the PCPA and PCPR which is not acceptable in a regulatory field where so much, in financial and health/environmental terms, is at stake. The next part of this Chapter will look at interpretive problems. Chapter II will consider procedural issues.

D. An Analysis of the PCPA and PCPR Provisions Affecting Registration: Interpretative Problems

Part B of this chapter provided a description of the registration process while highlighting the applicable regulatory provisions. This discussion of the

PCPA and PCPR will thus assume familiarity with the registration process and will move directly to an analysis of the legislative and regulatory scheme.

(1) Statutory standards in the PCPA and their relation to the PCPR

This section focuses on the registration process. However, it is instructive to begin discussion of the registration provision of the Act by comparing the manner in which two other tasks of the Act are linked to their related regulations. Thus the next two paragraphs deal with the manufacturing/storage and packaging/labelling provisions of the PCPA, which will then be compared to the registration provision.

s.3(1) of the Act states that no person shall manufacture, store, display, distribute or use any control product under 'unsafe conditions'; s.3(3) of the Act deems any breach of the regulations concerning the use of pesticides to be a breach of s.3(1). Thus s.3(3) makes compliance with the regulations a mandatory part of satisfying s.3(1).

A relation analogous to that just outlined also exists between s.3(2) of the PCPA [which prescribes standards for packaging, labelling and advertising], regulations adopted to elaborate such standards, and s.3(4) of the PCPA which deems a breach of the regulations to be a breach of s.3(2).

The registration provision for control products is s.4(1) of the Act:

4. (1) No person shall import into or sell in Canada any control product unless such control product
 - (a) has been prescribed;
 - (b) conforms to prescribed standards; and
 - (c) is packaged and labelled as prescribed.

Compliance with regulations is thus made a mandatory requirement throughout s.3 and s.4. However, s. 4(1) differs significantly from s.3 in the manner in which compliance with the regulations is linked to satisfaction of the statutory

requirements of the Act. S.3(1), which deals with manufacture, storage, display and distribution at least contains the standard of "unsafe conditions", while s.3(2) prohibits packaging, labelling and advertising that is "false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety".

In stark contrast to the foregoing provisions, s.4(1) gives no indication of the standards involved in the decision to grant or refuse registration and thus leaves the regulations governing registration without statutory guidance. Are considerations of safety and/or efficacy to be balanced in the Minister's decision? Or is the registration process intended to be concerned primarily with efficacy, leaving health concerns as the responsibility of other government departments and their legislative authority [see part A of this chapter]. In addition to the efficacy and safety concerns, do considerations of economic risk/benefit allow trading off of greater health risks for increased food production? What standards constrain this trading off process if indeed it is to be part of the implementation of the Act? The failure of the PCPA to set out relevant criteria for the registration process makes the regulations governing registration seem arbitrary, and inevitably leaves the administrative actors to "fill in the gaps" that result from the lack of guidance given to those who drafted the regulations. In this regard, it is interesting to note that the Director of the Pesticides Division of Agriculture Canada has described the pesticide evaluation process as "partly founded...on the risk-benefit principle in its broadest sense..."⁴⁶

Thus from s.4(1) of the Act we know only that registration is necessary for the import or sale of a control product, and that registration is governed by regulations. From the PCPA alone, it is impossible to form an impression of the

aim, standards, and structure of the registration process.

(2) Provisions of the PCPA authorizing regulations respecting registration

s.5 and s.9(5) of the Act set out the power of the Governor in Council to make regulations. The latter section involves regulations concerning seizure and thus will not be taken up in this Report. Under s.5 of the Act, s.5(b) and (d) relate directly to the registration process while s.5(f), (m), (n), (p), and (o) touch on the registration process.

It is clear that s.5(d) is the key authorizing provision for the creation of regulations controlling registration of control products, and of establishments where control products are manufactured. The provision also indicates that regulations must deal with the refusal, suspension and cancellation of registration as well as set out procedures for review of such decisions.

It is important to note that there is no explicit mention of 'temporary registration' in the PCPA, though the existence of temporary registration in the regulations may fall under the broad power to "make regulations respecting the registration of control products".

It is interesting to contrast this vague regulation-making power with the analogous provisions of the Environmental Contaminants Act⁴⁷ in which the grant of regulation-making power refers to specific paragraphs of the Act in order to clarify the intended scope of the subordinate regulation. The power to "make regulations respecting the registration of control products" sanctions everything and offers little guidance in the creation of a registration procedure. However, the flip side of the "minimal guidance" coin is the presence of minimal constraint in the drafting or amendment of regulations; thus, if a clear raison

d'être for the registration process were to be agreed upon, the PCPA offers minimal impediment to its embodiment in the regulations. Of course this latter statement only underscores the failure of the legislation. Where is the *raison d'être* to come from, if not from Parliament? To say that it offers minimal impediment is to say that it had no vision or sense of purpose in the first place. Certainly regulations which are made pursuant to s. 5 of the PCPA do not conform with what is said to be a guiding principle of the Regulatory Policy of the present government, that regulations "be brought more fully under the control of elected government representatives and subjected to more effective review by Parliament."⁴⁸ Neither does the Act conform with the recommendation of recent Report of the Law Reform Commission of Canada that constituent and enabling Acts "should define broad objectives as clearly and in as plain and as unambiguous language as possible."⁴⁹ The PCPA could not be further from achieving this objective. Everything is left to the regulations.

Given the vagueness of the Act's provisions regarding registration, it is not surprising that the present regulations concentrate discretionary power in the hands of the Minister; the wide latitude given to the regulations under the Act is in effect passed on to him. Unfortunately, the regulations concerning registration are not well drafted and suffer from a number of interpretive difficulties which will be discussed in the next section.

(3) The PCPR and the registration process

(a) The status of temporary registration in the PCPR

A fundamental interpretive difficulty in the PCPR, which was problematic in the Alachlor episode and which plagues the regulations throughout, is the

ambiguity in the word 'registration'. This ambiguity arises because of the presence of a provision for temporary registration (s.17) in the PCPR. The reference to temporary registration results in confusion because the word 'registration' can now have two meanings.

First, 'registration' could be interpreted in its generic sense as including both temporary and non-temporary registration. Alternatively, 'registration' could be interpreted in contrast with temporary registration and taken to mean only non-temporary registration.

There is no decisive interpretation since it could be argued that temporary registration is merely a form of registration and thus any reference to registration that did not expressly exclude the temporary variety must include it. One could support this view by pointing to the absence of application and refusal provisions specific to temporary registration.

Supporters of the more restrictive interpretation, i.e. that "registration" does not include temporary registration, can argue that the circumstances in which temporary registration may be granted constitute a Ministerial prerogative for emergencies and as a short term measure pending the Minister's acquisition of more data from the applicant. This interpretation could be supported by reference to the Minister's power to register products for any duration in s.14(1), provided that the period of validity is set out in the certificate of registration. In this sense a temporary registration is distinct from the term 'registration' since short term registrations can be accommodated within the term 'registration', and temporary registration must therefore be considered as something distinct from the rest of the registration process. This interpretation of temporary registration as a separate Ministerial power would also explain the absence of application and refusal provisions that explicitly

refer to temporary registration.

Of course, the reason this matters is that the refusal, suspension, and cancellation provisions, the notice and duty to give reasons provision, and the provisions regarding the circumstances in which rights of review arise, are all phrased in reference to the term 'registration'; thus the ambiguity inherent in that word is transported along to all of the above noted provisions. The Alachlor issue of whether refusal of temporary registration for the period requested constituted a refusal of registration, and whether such refusal gave rise to review rights, is just one manifestation of this ambiguity. The Alachlor judgment of Cullen J. indicates that the references to registration in s.13, s.15 and s.18-25 are likely to be interpreted by the courts as including temporary registration. Thus, following the reasoning of Cullen J., application provisions which mention 'registration', and certainly the review rights that arise upon refusal, suspension or cancellation, apply to temporary registration just as they do to non-temporary registration.

(b) Standards in the PCPR

(i) Standards for registration or refusal

The previous section pointed out that the application provisions of the PCPR [s.7-12] must be taken to apply to temporary registration as well as non-temporary registration. However, once attention passes beyond the application provisions to the granting/refusal provisions, applications for temporary and non-temporary registration can no longer be treated in the same way since there are separate provisions [s.13 and s.17] governing each.

There is also a further complication. The arguments provided in the previous section (including the decision of Cullen J) lead one to conclude that

although the granting power of the Minister differs for temporary and non-temporary registration, the s.18 refusal provision applies to both.

Thus there is a need to clarify the functional relationship between: (i). s.13 and s.18 ; and (ii). s.17 and s.18.

s.13's mandatory obligation to register control products is subject to s.18's list of conditions allowing the Minister the discretion to refuse registration. Thus an analysis of the s.18 conditions must be undertaken.

s.18(a) and (e) are straightforward and need not be discussed further. The remaining three provisions [s.18(b),(c) and (d)] concern insufficient information, product efficacy, and public health respectively.

s.18(c) clearly places the onus on the applicant to establish that the control product has "merit or value for the purposes claimed". The applicant's failure to meet this standard would thus trigger the Minister's discretion to refuse registration.

s.18(d) allows the Minister discretion to refuse registration if, in his opinion, the use of the control product would lead to an unacceptable risk of harm to

(i) things on or in relation to which the control product is intended to be used, or

(ii) public health, plants, animals, or the environment.

As with the other criteria set out in s. 18, the Minister need not refuse registration in cases which involve an unacceptable risk of harm, even to human health. The provision says only that the Minister may refuse.

One last point needs to be made in relation to s.18(d). In order for the Minister to have the discretion to refuse, he must be of the opinion that the use of the control product would breach the unacceptable harm standard. The question then arises, 'what if he isn't sure ?'; does the Minister lose the discretion to

refuse (i.e. must he register) a control product if he is uncertain about whether use would lead to an unacceptable risk of harm?

The answer to the above question is 'No'. The authority for this response is s.18(b), which states that his discretion to refuse may be exercised if the information provided on application is insufficient to enable the control product to be assessed or evaluated. If, at the end of the day (or year), and after having received information on safety from sources within and outside his own department, the Minister is still unsure of whether use of the product would lead to an unacceptable risk of harm, it seems safe to conclude that the information submitted upon application could not have been sufficient to allow assessment or evaluation. Thus the Minister has discretion to refuse registration in cases of uncertainty under s.18(b). This is consistent with the position of the Pesticides Directorate that a pest control product is "guilty until proven innocent".

As has been pointed out above, the combination of s.13's mandatory obligation to register with s.18's discretion to refuse registration makes s.18's conditions crucial in defining the scope of the Minister's powers to grant non-temporary registration.

The situation of temporary registration is quite different. This is because, although as a matter of post-Alachlor construction, s.17 and s.18 must be assumed to operate together, the resulting combination juxtaposes a discretion to refuse [s.18] with a discretion to temporarily register [s.17].

If one assumes that the provisions of s.17(1)(a) or (b) apply, it seems that the Minister would possess both an absolute discretion to grant temporary registration, and a circumscribed discretion to refuse. The two are incompatible.

It is difficult to resolve which provision prevails in cases of conflict. The explicit reference to s.18 in s.13, together with the absence of such a reference in s.17, inclines one to the view that s.18 cannot be taken to exhaust the permitted grounds for refusal of temporary registration. Thus, while the mandatory obligation of s.13 requires that the Minister's refusal to grant non-temporary registration be exercised with reference to terms in s.18, the absence of a mandatory obligation to temporarily register in s.17 appears to lead to the following result: the Minister 'may' refuse to temporarily register under the conditions of s.18; however, should s.18 conditions not apply, he would not be bound to temporarily register the product-- [even though he would have been bound to non-temporarily register the same product in like circumstances].

While this may seem like a mind-game to many readers, there is one simple point to be made: the relationship between temporary registration and "full" registration in the PCPR must be clarified, particularly to avoid the problem which arose in the alachlor proceedings of triggering the review provisions with respect to temporary registrations.

(ii) Standards of suspension and cancellation

It has long been considered a problem with the PCPR that the standards for registration or cancellation are too vague. s.20 states that the Minister may, on such terms and conditions as he may specify, cancel or suspend the registration of a control product when, based on current information available to him, the "safety of the control product or its merit or value for its intended purposes is no longer acceptable to him". As has been stated previously, the above standard must be taken to apply to cancellation or suspension of both temporary and non-temporary registration.

The primary issue to be raised in regard to the suspension/cancellation standard is whether it differs from the health and product efficacy standards that apply upon application for non-temporary registration (s.18). The "merit or value" wording in s.18(c) is repeated in s.20; thus, the standard for product efficacy upon refusal of registration is very similar to the suspension/cancellation standard. The difference between the two provisions lies in the health/safety standard. The Minister's discretion to refuse registration in s.18(d) is defined by reference to an "unacceptable risk of harm". The health/safety consideration in s.20 requires only that the "safety" of the product be unacceptable to the Minister. As a matter of practice, the latter two standards may be identical, but from the viewpoint of legal interpretation, they need not be. In either case, the standard is so vague as to be incapable of application without the further structuring of the discretion through guidelines developed by Agriculture Canada.

(c) The role of the Review Board and the applicable standards

In the alachlor episode, there was, and continues to be, a good deal of confusion around the role of the Review Board. Is it to make the decision which the Minister ought to make, or at least to give the Minister advice as to the decision on the merits? Is it to decide if the Minister's decision was a reasonable one, or a fair one? Some observers believe that the Review Board is only to consider the legality of the Minister's decision. The consequences of these questions are profound - must all of the evidence which was taken into account by Agriculture Canada be presented to the Board? Is the Board entitled to receive new evidence, which was not presented to the Department? In the first alachlor hearings, the confusion around this point was underscored by the fact

that Monsanto argued that the only issue was fairness, hence neither the government nor the company submitted technical data. Yet the Board then conducted its own risk-benefit analysis based on information "in the public domain".

Neither the PCPA nor the PCPR provides a clear indication of the role of the Review Board or the standards involved in review. This shortcoming cannot be overstated. What follows is a summary of what may be gathered from the process as a whole.

First, one may observe that the Review Board's function is highly unlikely to be to assess the legality of the Minister's actions. This view is supported by a number of points. First, the discretion given to the Minister is so wide that the inclusion of a mandatory obligation to create a Review Board to assess legality would be an exercise in futility. With such vague standards, the question of "legality" is hardly to the point. Second, the appropriate forum for assessment of legality would be a court. Thus, if legality had been the intended focus of review, the inclusion of a statutory right of appeal would have been far more appropriate. Surely, one does not need an expert in toxicology or economics to assess questions of legality.

One must also note that the regulations allow the applicant/registrant to both trigger the review process and to set the Board's agenda. This latter point is remarkable in that the Minister, in whom control is concentrated both before and after review, is rendered an onlooker for the duration of the Board's activity. His actions during review consist of a mandatory obligation to appoint a Review Board. There is no provision in the PCPA and PCPR which explicitly gives the Minister any power to alter the agenda of the Board as established by the applicant/registrant's s.23 letter.

The PCPR review provisions thus appear to exist as a means for ensuring that the Minister receive an independent assessment of the product efficacy/safety considerations connected to a particular case; and, that the independent assessor deal with the issues the applicant/registrant feels should be addressed. The Board's function is of course limited to providing the Minister with an independent assessment since the Minister retains authority for the ultimate disposition of the case [s.25(3)].

This does not answer the question of the evidence which ought to be received by the Board. On one hand, it seems difficult to argue that the Board should not receive new information. For example, the Minister could refuse registration on the ground that the information provided is insufficient to enable the control product to be evaluated (s.18(b)). Since it is the applicant which defines the mandate of the Board (s.23), the applicant might very well define the mandate in terms of the sufficiency of new information. However, since the scheme of the PCPA is to provide for a review of Ministerial decisions and since cancellation or suspension is based on "current information available to [the Minister]" (s.20, PCPR), it would be more than a review for the Board to hear new evidence. In the end, unless the regulations are amended, it will probably be left to the discretion of individual review boards.

One can now raise the issue of the standards which the Board is to use when performing its independent assessor role. Given the discussion above regarding the Board's function, (and judging from the Alachlor experience), a strong case can be made that the Board "steps into the Minister's shoes" and formulates its recommendations to the Minister based on its opinion of what the Minister's decision should be. It follows that the standards for review are the standards referred to in the previous two sections; the difference being that the Board

makes its recommendations on what it, standing in the place of the Minister, would have felt constituted an unacceptable risk of harm, or when the safety, merit, or value of a control product had become unacceptable. But, as has been noted, since the mandate of the Board is defined by the applicant/registrant, the ultimate influence upon the role of a Review Board is neither the PCPA nor the PCPR. Rather it is a party with an interest in steering the Review Board away, if possible, from factors which were not in its favour during the Ministerial decision-making process.

CONCLUSION

This chapter has described the legislative and regulatory scheme of the PCPA and PCPR. It has identified numerous shortcomings of both the Act and the Regulations. The PCPA is unacceptably lacking in direction as to the balancing of values in registration of pest control products. The PCPR contain many inconsistencies, ambiguities and anomalies. In the rare case where a Review Board is established, the role of the Board in relation to the Minister is not clear. Moreover, even if the respective roles were clear, the Board would still, like the Minister of Agriculture, have to apply the vague standards of the PCPR.

Obviously the scheme is in need of some serious clarification. Discussion of specific proposals for amendments must await, however, a consideration of some related procedural problems which will be taken up in Chapter II.

ENDNOTES, CHAPTER 1

1. Constitution Act, 1867, s.92(5)
2. Ibid., s.92(13)
3. Id., s.92(16)
4. Id., s.92(10)
5. Id., s.91(27)
6. Id., s.91(2)
7. Id., s.91 preamble
8. J.F. Castrilli and Toby Vigod, Pesticides: An Examination of Canadian Law and Policy, draft report prepared for the Law Reform Commission of Canada (1983), at p.62
9. Liora Salter and William Leiss, Consultation in the Assessment and Registration of Pesticides, Final Report and Recommendations, at p.9 and p.21ff
10. R.S.C. 1970, c.P-10, as amended
11. C.R.C. 1978, c.1253, as amended
12. R.S.C. 1970, c.F-27, as amended
13. S.C. 1974-75-76, c.72
14. R.S.C. 1970, c.F-14, (1st Supp.) as amended
15. S.C. 1974-75-76, c.55
16. R.S.C. 1970, c.5, (1st Supp.) as amended
17. R.S.C. 1970, c.M-12 as amended
18. R.S.C. 1970, c.2, (1st Supp.) as amended
19. S.C. 1980-81, c.36
20. See, Pesticides Workshop Proceedings, Canadian Council of Resource and Environment Ministers, Workshop on Pesticide Use and Control, 1982. See also Memorandum of agreement between Agriculture Canada and Health and Welfare Canada on pesticide evaluation; S.W. Ormrod, "Registration of Pesticides in Canada under the Pest Control Products Act", Speech to the International Symposium on Health and Safety in Agriculture, Saskatoon, October 9, 1985.

21. E.g. the Expert Committee on Pesticide Use in Agriculture; Expert Committee on Insect Pests of Animals; Expert Committee on Vertebrate Pests; Expert Committee on Weeds. For summary of activities, see Pesticide Use and Control in Canada, Government of Canada publication (1985), at p.16-19.
22. S.W. Ormrod, supra, note 20, at p. 3.
23. The upgrading of the Pesticides Division to a Directorate within Agriculture Canada was announced in a Trade Memorandum, T-1-251, Re: Implementation of the Salter Report on Pesticide Control, July 26, 1985.
24. Guidelines for Registering Pesticides and other Control Products under the Pest Control Products Act in Canada, Pesticides Division, Agriculture Canada, January 5, 1984, at p. 4.
25. H.W. Major, President, Canadian Agricultural Chemicals Association, "The Contribution of the Industry to the Information Required for Registration" in Pesticides Workshop Proceedings, supra, note 20, at p. 48.
26. Canadian Horticultural Council, Report of the Pesticides Review Committee to the 62nd Annual Meeting, March 4-7, 1984. This Report is appended to the Salter Report.
27. See supra, note 24 and various trade memoranda. These are included in a "Registration Kit" provided to applicants by Agriculture Canada.
28. The roles of the respective departments are described in Pesticide Use and Control in Canada (1985) Supply and Services.
29. Ibid., at 31; Salter, supra, note 9.
30. Ormrod, supra, note 20, p. 5.
31. J. Taylor, "Reevaluation Process of Registered Compounds", supra, note 20, at p.121
32. Letter from Monsanto to the Minister of Agriculture, Nov. 13, '85.
33. Monsanto Canada v. Minister of Agriculture, (F.C.T.D.) Jan. 23, '86, unreported. Cullen J. at p.8
34. Ibid., p.13
35. Id., p.12
36. Alachlor Review Board Report, Feb. 26, 1986, p.12
37. Alachlor Review Board, Guide for Parties, December 1985.
38. Letter from Elizabeth May, Counsel for Pollution Probe and Friends of the Earth to Mr. Justice Shapiro, Chairman of the Review Board, March 6, 1986.

39. Van Engelen et al. v. Minister of Agriculture, Federal Court Trial Division, File No. T-513-86.
40. Monsanto Canada Inc. v. Minister of Agriculture, Federal Court Trial Division, File No. T-518-86.
41. Alachlor Review Board, Supplementary Report to the Minister of Agriculture, March 24, 1986.
42. Letter from the Minister of Agriculture to Monsanto Canada, March 26, 1986.
43. Monsanto Canada v. Minister of Agriculture, (F.C.T.D.), April 8, 1986, unreported. Collier J. at p. 18.
44. Letters from Hon. John Wise, Minister of Agriculture, to Review Board Participants, April 15 and April 21, 1986.
45. In 1977 there was a Review Board established to make recommendations on Leptophos. There was a Report to Hon. Eugene Whelan, Minister of Agriculture, May 2, 1977. The experience of the Leptophos Review Board is reviewed in Castrilli and Vigod, supra, note 2, at fn. 540-553 and accompanying text. The Leptophos Review Board recommended that the registration be cancelled and that advice was followed by the Minister. The matter was not uncontroversial at the time, either as regards the standard to be applied or as regards the weighting of economic and health/environmental factors. However, it was not nearly so controversial as the alachlor hearings with respect to the procedures followed.
46. S.W. Ormrod, "Perspectives on Pesticide Evaluation", Proceedings (1982), note 20, at p. 74. In a 1985 speech, Mr. Ormrod, remarked that the standard is shifting from risk/benefit judgments to risk/benefit analyses, or at least that there is a "growing interest" in the latter approach, supra, note 20, at 10.
47. Supra, note 13, s.18
48. Announcement of Regulatory Reform Strategy, including a Regulatory Policy consisting of ten Guiding Principles, House of Commons, Debates, February 13, 1986, Mr. Nielsen, Deputy Prime Minister.
49. Report on Independent Administrative Agencies (No. 26) (1985) at p. 44.
50. Supra, note 22.
51. In Van Engelen et al. v. Minister of Agriculture, supra, note 39, an alternative ground for seeking the order of prohibition was that the Minister did not have the authority to grant the temporary permit in the first place.

CHAPTER II. PROCEDURAL PROBLEMS IN THE REGULATION OF PESTICIDES

In the course of the alachlor cancellation and the Review Board hearings, several major issues arose regarding the appropriate procedures to be followed by the Review Board or by the Minister. This Chapter will analyze those problems as well as some other potential issues of procedure arising from the registration scheme established by the P.C.P. Regs. The primary focus in this part will be on the procedural obligations of the Minister. This focus is warranted since the Minister, acting on the advice of his department, is the formal decision-maker in virtually all cases under the present regime, there having been only two Review Boards in fifteen years. Furthermore, it is obvious, even at this point, that an implicit issue throughout this Report, particularly in light of the problems experienced with the Alachlor Review Board, will be the question of what procedural obligations would rest upon Agriculture Canada if there were no Review Boards. Accordingly, the Minister will be accorded most attention, although there will be consideration of the role of Review Boards. Also there will be consideration of the issue of public participation which cuts across the decision-making process.

II. A. The Primary Decision-Maker: The Minister

This part of the paper will consider the procedural obligations which may be imposed upon a decision-maker acting under the P.C.P. Act to register, cancel or suspend a pest control product. It will look beyond the existing regime and effectively ask: what procedural obligations would be imposed upon the Minister if no provision, even for a review board, were made in the legislation? It will also ask: even if the legislation or regulation explicitly says that no

procedures are due, what requirements might be imposed on constitutional grounds? The issue will be addressed in two parts: first, the nature and sources of procedural obligations, and, second, the likely content of such obligations. It will be assumed that the Minister will continue to be the primary decision maker.

(1) The nature of the Minister's obligations, both common law and constitutional

(a) The common law duty to be fair

Ten years ago in Canadian administrative law, it would in all likelihood have been said that the Minister of Agriculture, when acting to register, cancel or suspend a pest control product, was subject to no procedural duties other than those specified by the legislation or by regulation. Of course the Minister would not be allowed to exercise his discretion for an improper purpose¹ and one could obtain judicial review if the Minister acted in deliberate bad faith.² However, as regards the granting of any kind of a formal hearing, even to a registrant on cancellation, it would likely have been said that the Minister's decision was administrative rather than quasi-judicial and that consequently no procedural obligations were owed. A number of factors were relevant to such a characterization. First, a Minister of the Crown was normally considered to be politically, rather than judicially, accountable. For example, even in a case dealing with the expropriation of land, which was traditionally accorded the greatest protection under common law principles, the Supreme Court of Canada said in 1959:

His decision is as a Minister of the Crown and, therefore, a policy decision, taking into account the public interest and for which he would be answerable only to the Legislature.³

Moreover, the authority of the Minister under the Pest Control Products Act is stated in broad, discretionary terms and no provision is made for an appeal from

the Minister's decision.⁴ Another reason why a decision of the Minister would, according to traditional common law doctrine, not likely have been considered to be quasi-judicial is the ambiguous status of the interest affected. A quasi-judicial characterization was traditionally saved for "vested rights", with real property or personal liberty being the paradigm cases, while interests which could be characterized as "privileges" were relatively unprotected. It is still the case, even in recent jurisprudence that a licence-holder is not given the same degree of protection as are some other affected parties. For example, the Supreme Court of Canada has recently turned aside a claim to natural justice by C.T.V. in the context of a broadcasting licence renewal by the C.R.T.C. In the words of Laskin C.J.C.:

This was not a case where CTV was being required to answer a criminal charge or penal charge or where some property right was in jeopardy, or where punishable misconduct was alleged, but where it was seeking an indulgence....An applicant seeking a statutory privilege has no right to know in advance of a probable decision unless the statute commands it or the administering tribunal wishes to disclose it.⁵

It must be acknowledged that there were cases where, under common law doctrine, licence-holders successfully made claims to notice of a cancellation or suspension; but the successful claims arose in situations where the decision was to be made according to relatively precise criteria, not on broad political considerations, and where the decision was in the nature of a punishment of or a singling out of the licence-holder.⁶ Given the broad range of factors involved in the Minister of Agriculture deciding that "the safety of the control product or its merit or value for its intended purposes is no longer acceptable to him", including consideration of an unacceptable risk of harm to public health, plants, animals or the environment, it is unlikely that it could be successfully argued, under the old doctrine, that the Minister's decision ought to be characterized as

a quasi-judicial one.

Since the mid-1970's the jurisprudence of procedural judicial review has changed in Canada so that it is no longer necessary to characterize a decision as quasi-judicial in order to qualify for procedural protection. It is now said that : "[T]here is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights privileges or interests of an individual."⁷ The effect of this jurisprudence is that now virtually every statutory decision-maker is subject to a duty of procedural fairness. The "rights-privilege" dichotomy is no longer talismanic. Neither is that between quasi-judicial and administrative decision-makers. The exact content of the duty of procedural fairness will vary depending on the decision-making context, but it will often involve "importing something less than the full panoply of conventional natural justice rules."⁸

There is still one qualifier which has yet to be fully worked out in the jurisprudence of procedural fairness which may apply to the Minister of Agricultural in his capacity under the P.C.P. Act and Regulations. It is said that the duty of fairness does not extend to decision-makers "of a legislative nature",⁹ An example of what the Supreme Court of Canada considers to be "legislative action in its purest form" is an appeal to the federal Cabinet from the CRTC regarding the fixing of rates for Bell Canada's telephone system.¹⁰ In a decision of the Supreme Court declining to find a duty of procedural fairness in the context of cabinet appeals, it was considered significant that Parliament had not "burdened" the executive branch with any standards or guidelines in the exercise of its rate review function.¹¹ Also taken into account were "the very nature of the body", the impracticality of giving notice to all of the affected

parties (assumed to include all Bell subscribers), and the power given to the Cabinet to act on its own motion. There are many parallels between the function of the Cabinet to hear appeals from the C.R.T.C. pursuant to s.64 of the National Transportation Act and the power which is given to the Minister under the P.C.P. Act and P.C.P. Regs. The power is not clearly confined by standards. The Minister, according to s.25 of the P.C.P. Regulations, "may take such action with respect to the subject matter of the hearing as he deems advisable." The Regulations imply no procedural obligations except to "notify the person who applied for the hearing of any action so taken."¹² As for the impracticality of notifying numerous parties (a point made in Inuit Tapirisat, and accepted as a persuasive argument that the appeal to Cabinet was a legislative and not a judicial function) the same problem could be said to arise in the case of a decision by the Minister under the P.C.P. Act. One would wonder however why it would not be sufficient in either the appeal in Inuit Tapirisat or in the Post-Review Board phase of pesticide regulation to simply notify the parties to the earlier hearing. In any event, there are some significant parallels between the function of cabinet under s.64 of the National Transportation Act in Inuit Tapirisat and the Minister of Agriculture when considering the report of a Review Board under the P.C.P. Act.

If there is one potentially significant difference between these two decision-making contexts, it is "the nature of the body". This factor was emphasized by the Supreme Court in Inuit Tapirisat. In the case of the Cabinet, a court is no doubt very hesitant to impose additional procedural requirements which could have the effect of rendering the decision-maker incapable of doing the assigned task. In the case of the Minister of Agriculture, there are a number of ways in which the obligation to be fair might conceivably be met

without making the job impossible. Indeed that is apparently what the Minister did in the *alachlor* proceedings in response to the decision of Collier J.¹³ when he wrote to the parties and invited written responses. Further on the issue of whether the Minister could be successfully characterized as a "legislative" decision-maker, and thereby exempt from the requirements of procedural fairness, it should be conceded that the best evidence of the weakness of a potential argument that the Minister is legislative is the decision of Collier J., which does not hesitate at all to impose a duty of fairness.

In conclusion it can be said that there is now plenty of evidence that Canadian courts are willing to impose some duty of fairness upon members of the Executive and upon Cabinet itself.¹⁴ Even in the *Inuit Tapirisat*, decision. Estey J. made it clear early in his judgment that: "[T]he mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond review.¹⁵ A recent Nova Scotia decision has imposed upon the Lieutenant Governor a duty to accept submissions when considering the recommendation of an Advisory Board acting pursuant to section s.47 of the Criminal Code: i.e. when deciding to release or even to transfer a prisoner who is detained pursuant to a Lieutenant Governor's Warrant after being found not guilty by reason of insanity.¹⁶ All things considered, this latter power is more analogous to that of the Minister of Agriculture acting with respect to pesticide registration under the P.C.P. Act than is the appeal to Cabinet in *Inuit Tapirisat*. The *Inuit* decision must be seen as an anomaly in the context of a widespread trend to impose more and more procedural obligations upon administrative decision-makers, including cabinet ministers. And, as has already been stated, this is especially so where the decision involves serious financial consequences for affected parties. Accordingly the Minister of Agriculture is in all likelihood under a

duty to act fairly in exercising his authority under the P.C.P. Act.

(b) Constitutional obligations

To this point only the common law objections of the Minister have been discussed. It is basic to the nature of such common law obligations that they can be overridden by explicit statutory provisions. In theory, then, it might be the preference of the government to simply give explicit direction in the P.C.P. Act that the Minister's decision is to be made without any procedure for a hearing at all. This raises the question of whether there are any constitutional principles preventing or potentially overriding such a statutory provision. There are, generally speaking, two such potential sources: The Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms. Up until 1985, no one would take seriously a suggestion that the Bill of Rights would be employed as a source of procedural or any other constitutional obligations. However, with the impetus of a 1985 decision by the Supreme Court,¹⁷ the Bill of Rights has been, in the words of the Federal Court of Appeal, "reinvigorated".¹⁸ Of specific relevance in the present context is the guarantee of section 2(e) of the Bill:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

The outstanding feature of this provision of the Bill of Rights by comparison with what might be considered its counterpart in section 7 of the Canadian Charter of Rights and Freedoms is that the Bill does not place the same

emphasis upon personal interests, to the apparent exclusion of property interests, which one finds in the Charter¹⁹. The comparative breadth of section 2(e) of the Bill can be demonstrated by reference to the position taken by the Attorney General of Canada in Singh. In that case, the Attorney-General did not dispute that the process of determining and redetermining refugee claims involved a question of "rights and obligations". However, the Attorney General took the position that no question of "the right to life, liberty and security of the person, as guaranteed by section 7 of the Charter, was involved.²⁰ It can thus be seen that the concept of "rights and obligations" in section 2(e) of the Bill of Rights is perceived to be wider in scope than section 7 of the Charter.

It is difficult to argue the interest of a registrant in gaining or retaining the registration of a pesticide would not fall within the words "determination of his rights and obligations".²¹ If that is so, there would be a constitutional obligation on the Minister to accord with "principles of fundamental justice" when reaching a decision. It is conceivable that the "rights-privilege" distinction might be resorted to, especially in the case of an application for registration. However it is more likely that all of these decisions would be considered to involve "rights and obligations" and that any lesser perception of the protection appropriate for applications, as opposed to renewal, suspensions or cancellations would be dealt with in terms of a flexible scale of what constitutes "fundamental justice".²²

What is more controversial in terms of constitutional guarantee of procedural fairness is the question of whether the interest of a registrant of a pesticide can be considered to constitute "life, liberty or security of the person" and thereby to come within the terms of section 7 of the Canadian Charter of Rights. The wording of section 7 is as follows:

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

On a bare reading of the provision itself, taking into consideration the ordinary meaning of the words "life, liberty and security of the person", it would seem surprising that what is patently a commercial interest could be considered to come within the protection of section 7.²³ There is ample evidence in the constitutional debates leading to the adoption of the Charter that section 7 was deliberately designed so as to exclude property.²⁴ However, notwithstanding the explicit choice to leave protection of property out of the Charter there have been decisions interpreting section 7 in which commercial interests not entirely dissimilar to the interest of the registrant of a pest control product have been recognized as coming within the protected interests of "life, liberty and security of the person". For example the seizure of restaurant equipment pursuant to provincial sales tax legislation has been considered to be subject to the protection of section 7 since security of the person "must be construed as comprising the right to enjoyment of the ownership of property which extends to 'security of the person'".²⁵ In another case the refusal by a municipality to grant hotel licenses to an existing operation was said to be an interference with the "liberty" of the corporate hotelier: "the liberty to pursue a calling".²⁶ The right of a doctor not to be constrained by a policy of regionally-based billing numbers has been considered to come within the concept of "liberty". In that case, it was said that:

Rights we have enjoyed for centuries include the right to pursue a calling or profession for which we are qualified and to move freely throughout the realm for that purpose.²⁷

Thus there is some evidence that Canadian courts are prepared to interpret "life,

liberty and security of the person" to include commercial interests.²⁸ On balance however it is doubtful that commercial interests which do not affect personal security will be so protected.

A recent Ontario decision which bears important lessons for the P.C.P. Act context illustrates graphically the significance for Charter purposes of the distinction between personal and property interests. The County of Oxford applied for approval of a waste disposal site within its boundaries. After a lengthy public hearing before a joint board pursuant to the Consolidated Hearings Act, the application was refused. The County applied to the Cabinet to rescind or vary the decision of the joint board.²⁹ By order-in-council, Cabinet reversed the decision and the certificate authorizing the establishment of the disposal site was subsequently issued. A number of individual citizens, living in the neighbourhood of the proposed site, sought a declaration that the Cabinet decision was null and void for not having been taken in accordance with fundamental justice. The action was dismissed, by a divided Divisional Court, on the ground that the claim turned on a property interest rather than on security of the person. In the words of Saunders J.: "It is well known that the omission of the word 'property' from the section was deliberate when the Charter was enacted". Later it was held:

While one has considerable sympathy with property owners whose use and enjoyment of their property have been diminished by events occurring around them, the claims of the plaintiffs in this case do not, in my opinion, fall within the ambit of s.7. They are essentially claims with respect to property rights which, in my opinion, are not covered by the section.

I, therefore, conclude that the facts alleged in the statement of claim could not constitute a violation of s.7 of the Charter.³⁰

The dissenting judge, Potts J., preferred to characterize the matter as one relating to the personal health of the plaintiffs.

With respect, I am unable to agree with Saunders J.'s characterization of the Charter claim as a claim in respect of property rights. I agree that property rights are not protected by s.7 of the Charter but, according to my reading of the statement of claim, the landowners' Charter claim is based on their personal health concerns. Their concerns regarding damage to their property are dealt with in the nuisance claim.

Admittedly, the landowners failed to specifically plead detriment to their health. They pleaded that contaminated water would leak from the waste disposal site into their wells. A reasonable inference may be drawn that the health of these people will suffer. If a specific pleading alleging risk to health is necessary, then surely this is an appropriate case for leave to amend the statement of claim. All of the necessary facts to support the conclusion that the health of the plaintiffs will suffer have been pleaded.³¹

This decision demonstrates three important points with respect to the interpretation of section 7. First there is the deliberate attempt, at least in courts which treat seriously the text of section 7 and its background, to keep "property" claims out of section 7. Second, depending on how a particular case is pleaded, the characterization of the interest as one of property or as security of the person is a matter upon which reasonable people can differ. Third, of particular significance in the context of the P.C.P. Act, while the property interest of corporations such as the holder of a pesticide registration is probably not protected by section 7, the health interest of members of the public may well be.

To this point the focus of the discussion has been on the commercial interest of the registrant. This follows from the common law preference to protect property interests. What is raised by the discussion of the section 7 jurisprudence interpreting "life, liberty and security of the person" is the possibility that the Minister may be found to have constitutional obligations to accord with principles of fundamental justice, not to registrants of pesticide products, but to citizens whose interest is based upon environmental or health

concerns rather than upon a commercial interest. It is implicit in the decision of the Ontario Divisional Court in Manicom (supra) that a claimed risk to health would at least have gotten beyond a preliminary motion to quash. In the Operation Dismantle decision, the Supreme Court impliedly accepted that a risk to health, if proven, would constitute a deprivation of security of the person.³² In that case, Dickson J. offered the hypothetical of forcing citizens to participate in the experimental testing of a deadly nerve gas as an act of government which he would "find hard to believe would survive judicial review under the Charter".³³ Thus, without for the moment specifying what the actual content of fundamental justice might be as regards individual concerned citizens or public interest groups, it seems that this ought to be recognized as another potential source of Ministerial obligation.

To conclude this part, there are several sources from which procedural obligations of the Minister, or, for that matter, any other decision-maker acting under a statutory scheme can be derived. The first, of course, is the statute itself. The second is the common law which combines a process of statutory interpretation with a certain element of gap-filling or complementing the work of the legislator. Beyond the common law requirements of procedural fairness or natural justice, which of course can always be set aside by an explicit statutory provision, there are constitutional guarantees of fair procedure in section 2(e) of the Bill of Rights and in section 7 of the Charter. What is readily apparent is that, unless the question of the applicable process for Ministerial decisions is explicitly and appropriately addressed in the P.C.P. Act or the Regulations, affected parties have several avenues of recourse by which they can have procedures imposed.

II. A. (2) Some Kind of Hearing: The Content of the Minister's Procedural Obligations

In the previous part, the nature and sources of the Minister's obligations have been considered. The specifics of the content remain to be worked out. However, before going into the specifics of obligations which might be imposed at common law or by the Constitution, it is well to recognize that the primary source of procedural obligations will continue to be the authorizing statute and the regulations. While the common law is available to fill gaps and the constitution can be resorted to where the legislative scheme deliberately stops short of a fair procedure, the most important and the most common definition of the Minister's obligations will be the legislative scheme itself.

The P.C.P. Act adopts the same style with respect to procedure that it does in dealing with most other issues. The Act itself provides only a skeletal reference to a power to make regulations "respecting the procedures to be followed for the review of cases involving the refusal, suspension or cancellation of the registration of any [pest control] product or establishment."³⁴ This provision was not included in the original version of the Act when it was introduced in Parliament. It was added in response to objections raised by representatives of the agricultural chemical industry when they appeared before the Agriculture Committee during consideration of the Bill and which were ultimately taken up when the Bill was in Committee hearings in the Senate.³⁵ While it is only an authorizing provision, establishing a power whereby the Governor in council may make regulations, section 5(d) of the Act could very well be taken as evidence, particularly given the circumstances of its enactment, that some process for the review of decisions refusing, suspending or cancelling registration was intended by the statute. In any event the Regulations have, since 1972, provided for notice to the applicant or registrant

of a decision to refuse, cancel or suspend registration³⁶, reasons for the decision,³⁷ an opportunity to apply within 30 days for a hearing³⁸, and a mandatory duty on the Minister to establish a Review Board of not less than three persons to whom the subject matter of the application (for the hearing) shall be referred.³⁹ The Regulations specify that the party applying for the hearing as well as all other persons "who may be affected by the subject matter of the hearing" shall have an opportunity to make representations to the Board at the hearing.⁴⁰ A copy of the recommendations of the Board is to be sent to the Minister and to the person who applied for the hearing.⁴¹ In addition to the Regulations themselves, there is the practice of the Alachlor Review Board which established procedures for the submission and exchange of written material, the presentation of oral testimony, complete with examination and cross-examination by counsel.⁴²

There are two major observations which can be made about this process. First, the hearing before the Review Board adheres to a formal model of decision-making, a model which in the alachlor hearings has proved to be time-consuming and costly. Second, the primary decision-maker, the Minister, remains, apart from the duty to establish a Review Board and refer the matter to it, wholly unencumbered, so far as the Regulations are concerned, by procedural requirements. There are two questions to which these observations give rise. First, are there additional obligations which basic standards of fairness or administrative practice impose upon the Minister? Second, is the review board process more formal than it need be? The latter of these questions will be taken up in a subsequent part of the paper.

As regards the procedural duty of the Minister, an efficient way to focus the discussion is to assume that the Regulations make no provision for a review

board and to pose the question of procedures in the following manner: what are the minimum requirements which will be imposed by the common law or by the constitution? Beyond these minimum standards there may be other procedures which are consonant with prevailing administrative practice in comparable decision-making contexts or with getting the job done in the fairest, most efficient manner? This "beyond minimum standards" analysis will be taken up in Chapter III.

(a) Characterizing the decision of the Minister: Is there a right to a "hearing"?

To deal with the question of the minimum procedural obligations which would be imposed upon the Minister if no provision were made for a review board, it is necessary to return to the exercise of characterizing the Minister's decision. The first point to recall when considering the question of how to characterize the Minister's decision is that this is no longer an all-or-nothing choice between administrative and judicial or quasi-judicial decisions. Rather, it is a matter of fitting the decision somewhere along a more flexible spectrum of procedural fairness. Even though the process is not the "all-or-nothing" choice of the traditional classification of functions, the factors relevant to locating the decision along the spectrum of procedural fairness remain substantially the same. There are three principal criteria: how serious are the consequences of the decision for affected parties; does the proceeding resemble a lis inter parties or have the trappings of a formal or adversarial process; and, does the decision-maker apply substantive rules to many individual cases as opposed to implementing social and economic policy in a broad sense?⁴³

(i) The interest affected

Turning first to the criterion of the consequence of a decision for affected parties, there are several classes of affected parties to be considered by the Minister when acting pursuant to the P.C.P. Act and Regulations. In addition to the registrant or applicant who maintains a commercial interest in a decision by the Minister, there is the public interest in human health and the natural environment and there is the interest of the agricultural industry, both in financial well-being as entrepreneurs and in physical well-being as applicators.

The registrant/applicant

Beginning with the interest of the registrant/applicant, there is a good deal of common law precedent for treating an application in a different fashion from a suspension or cancellation. A leading English decision, McInnes v. Onslow-Fane, sets up a three-way range of interests which arise in licensing: the "forfeiture" cases where some existing right or position is taken away, the "application" cases where a decision merely refuses to grant the applicant the right or position that he seeks; and, the "expectation" cases, an intermediate category where the applicant has some legitimate expectation that the application will be granted.⁴⁴ To begin, it ought to be reiterated that the claim that a license or a registration is a mere indulgence or a privilege is increasingly subject to question as a way of thinking about procedural obligations.⁴⁵ It is becoming more current, in keeping with the development of a more flexible approach generally to procedural fairness, to speak in terms of a range of interests stretched out along a spectrum from a point at which there is a low expectation to a point where the holder of a license has a legitimate expectation that it will be retained. It is for this reason that cases of cancellation or

suspension are thought to require greater procedural protection and this explains why these interests have sometimes been said to be the subject of quasi-judicial decisions under the more traditional classification of functions.⁴⁶

As we move along the spectrum away from cancellation or suspension, the next most serious case is that of a non-renewal. An Australian decision illustrates a developing trend toward analyzing these interests in terms of legitimate expectations. A challenge to a decision by the Australian cabinet not to renew the license of an insurance company to offer worker's compensation insurance was successful as the High Court observed: "In these circumstances the appellant had a legitimate expectation that its approval would be renewed or at the very least that it would not be refused without its having an opportunity of meeting objections raised against it."⁴⁷ A further observation by Gibbs C.J. is particularly germane to the context of the P.C.P. Act: "A company does not set up a business of insurance in the expectation that it will last for only one year: that would be quite inconsistent with the nature of the business of insurance."⁴⁸ In the context of pesticide registration and re-evaluation, it is conceivable that such an argument would be raised by distributors and registrants of pest control product. The initial investment, both in terms of capital and research, is enormous. The nature of the industry is that companies incur high initial costs of product development. Registrants engage in a great deal of bureaucratic and scientific "back-and-forth" with responsible officials in the expectation of recouping those "front-end" costs over the life of the registration. There is the practice which has developed whereby the registrant engages in a long-term, quasi-institutional relationship with responsible officials in Agriculture Canada and Health and Welfare Canada in an effort to develop a body of reliable information regarding the efficacy and safety of a

pest control product. Further there is the presumptive five year duration of an initial registration for all pest control products. In the light of this analysis of the expectation of a registrant, it is likely that a non-renewal would be considered to be of sufficiently serious consequence that the registrant could successfully claim some kind of hearing.

Even at the application stage, under the existing regime, the applicant has a very compelling case upon which to claim a legitimate expectation of at least some procedure before an application is refused. According to an industry estimate, the average turnaround time for full registration is about 800 days.⁴⁹ The cost of an application is difficult to estimate but it is now evident that the process has become so expensive as to be prohibitive to all but the best-established firms. Finally there is the mandate in section 13(1) of the Regulations that the Minister shall register a pest control product subject to section 18. Thus, even at the stage of an application for registration, the consequences of a refusal for the applicant are of such magnitude and the legitimate expectation of the applicant is such as to require some measure of procedural protection before an application is refused. It is of interest to note that, in 1969, when the amendment to section 5(d) of the P.C.P. Act was finally worked out between the Minister of Agriculture, Mr. Olson, and the Senate Committee on Banking, Trade and Commerce, Mr. Olson's initial proposal was that the reference in section 5(d) be to cancellation or suspension of registration but not to refusal. Under pressure from Senator Hayden, Chairman of the Committee, the Minister agreed to include the words "refusal to register". The position of Senator Hayden was obviously influenced by his characterization of the consequence for the applicant of the decision to refuse:

The Chairman: It is a wholesome thing that, when people are proposing to make such an important decision as whether

your product will be registered or not and, therefore, whether you are going to be in business or not, there does exist the possibility of a review of that decision.⁵⁰

A good deal more problematic would seem to be the question of whether the refusal of or non-renewal of a temporary registration should give rise to procedural protections. Whatever may be said of the expectation interest at the stage of an application for or of a renewal of full registration, the scheme of the legislation is clearly different in respect of temporary registrations. Whereas the Minister "shall", subject to section 18, grant a registration upon application, the temporary registration is conceived by the Act as something extraordinary. It has the purpose of giving an opportunity to generate additional scientific or technical information or to deal with emergency situations. The terms and conditions are to be specified by the Minister and the temporary registration is to be for a period not exceeding one year. The scheme of the Regulations is thus conceived as being outside the normal course of events and, hence, ought not to give rise to legitimate expectations that the temporary registration will be renewed. Subject to any elaboration of the scheme which might be derived from the practice which has been adopted by the Minister, the claim of any expectation at all with respect to temporary registration is a weak one. However, one cannot avoid recognizing the vulnerability of the entire scheme and the potential for reviewing judges to perceive matters in such a way as to impose procedural obligations, even in the case of temporary registrations.

Although neither Collier J.⁵¹ nor Cullen J.⁵² entered into an explicit analysis of the interest of Monsanto, it is implicit in both successful challenges to the process adopted by the Minister that reasonable persons, and in particular reasonable reviewing judges, are capable of seeing the interest of Monsanto in the renewal of a temporary registration in a sympathetic light. It

is for this reason that it will become critical that either the Act or the Regulations make some explicit reference to appropriate procedures. If the legislative and regulatory scheme remains silent, there is now plenty of evidence that a reviewing court may intervene and impose procedures upon the Minister, even on a temporary registration. As the concept of procedural fairness extends to more and more administrative decisions, the interest in having a temporary renewal seems likely to be recognized as being sufficiently serious to the registrant to justify requiring the Minister to comply with some duty of procedural fairness.

The public

Turning to the perspective of public interest groups, there is not much of a tradition in administrative law for treating such groups as having a free-standing "right to be heard". The normal argument for the participation of such groups is that the legislation or subordinate legislation permits it⁵³ or that, as a matter of common law, once it is decided to hold a hearing, it would be unfair to hear one side while excluding another.⁵⁴ There is some basis in the language of the P.C.P. Act or Regulations which might be interpreted as a specific mandate that the views of public interest groups must be taken into account. For example, the Regulations specify that the Minister may refuse to register where the use of the control product would lead, in his opinion, to an unacceptable risk of harm to public health, plants, animals or the environment.⁵⁵

There is not however any mention in the Act or Regulations which stipulates that the public interest groups must be given notice of any contemplated action or that there should be some kind of "hearing",⁵⁶ at least not at any stage of proceedings prior to the appointment of a review board. At the review board

phase a public interest group or publicly-minded citizen will have to meet the standard of a person "who may be affected by the subject matter of the hearing"⁵⁷ although this ought not to present a substantial roadblock to participation. It appears to be the best interpretation of the scheme of the P.C.P. Act or Regulations that public interest groups or interested citizens will have an entitlement to procedural fairness if there is a hearing. However, if no such hearing is held, it is difficult for such groups, or for interested citizens, to independently mount a claim to procedural fairness.

However, what is interesting in respect of public interest groups is to reiterate the point raised in the earlier discussion of constitutional obligations: that, whereas at common law a commercial interest such as that of the registrant was accorded far more protection than was the public interest in an issue such as health, the opposite is now the case in terms of interests protected by section 7 of the Charter. In the Township of Southwest Oxford⁵⁸ case as well as in Operation Dismantle,⁵⁹ the possibility that an interest in health or the environment could come within the concept of "security of the person" was not at all foreclosed. Indeed it was taken quite seriously.

The industry and user groups

As for agricultural industry groups, a similar analysis pertains as in the case of public interest groups. They can make a persuasive claim as "persons who may be affected by the subject matter of the hearing", once a review Board is established.⁶⁰ It may also be that, even without this statutory base for a claim to participate, the agricultural industry could make a successful argument to be allowed to participate since the relevant criteria for registration include risk of harm to "things on or in relation to which the control product is intended to

be used". Presumably this criterion, or the more general issue of "public health", includes the health of the applicator. In addition, the factor of the merit or value of a pest control product for its claimed purposes is one of vital interest to the agricultural industry. User groups are even more directly affected than are general public interest groups. Accordingly, they are almost certainly entitled to participate if a hearing is held.

More problematic is the question of whether they might successfully make a claim to procedural fairness even if no hearing, at the instigation of the applicant/registrant, is held. The most likely answer is that users cannot make an independent claim to be "heard" by the Minister but that they must be treated fairly by comparison with other interested parties. For example, if the interest of another party could be characterized as adverse to the interest of user groups, then it would be a problem of procedural fairness to accord one side more procedure or to hear one side to the exclusion of the other.⁶¹ None of this amounts to an independent claim to have the Minister undertake a particular procedure for user groups; so long as no procedure is adopted at all and the legislative scheme does not, as a matter of interpretation, give rise to a procedural claim, it is unlikely that user groups can mount a successful claim to be heard as a matter of procedural fairness. As for the Charter, user groups will have a strong prospect of qualifying their interest, at least in its health aspects, as "life, liberty or security of this person".

To summarize the discussion of the affected interests, it is highly probable that a registrant/applicant will be able to qualify its interest as sufficient to trigger the protections of procedural fairness. This may even be the case when the Minister deals with the removal of a temporary registration. However it would be surprising if a more explicit reference in the Regulations to confirm

that a temporary registration gives rise to no legitimate expectation would not be sufficient to respond to claims that procedural fairness is due. At other stages of the process of registration and re-evaluation, a persuasive claim can be made that some procedural fairness is due and a failure to make provision in the Regulations will only result in the imposition of procedures through judicial review, together with the attendant problem that the procedures imposed will be highly court-like. As for the interest of parties not having a direct commercial link to the registration, it is unlikely that they can mount an independent claim, at least not on the basis of the consequence to them of a decision, to procedural fairness. They may very well, however, be able to claim entitlement to "fundamental justice pursuant to section 7 of the Charter."

(ii) How formal or adversarial is the process?

At the outset of the discussion in this part, it was said that there were three criteria to be considered in deciding whether the Minister owes a duty to be fair. The first was the consequence for affected parties. Second, there is the question of whether the procedure provided by legislative or regulatory the scheme can be called adversarial or formal. The third criterion involves the scope of discretion of the decision-maker. Dealing with the question of the procedure provided, it is the case in administrative law that the more adversarial the proceeding or the context, the more likely it is that further, more formal, procedures will be imposed. If a proceeding or a decision-making process can be characterized as a lis inter partes, it is much more likely to be expected to conform with a court-like standard. It is for that reason that disciplinary proceedings have become a paradigm case for formal procedures; a person must have an opportunity to confront his "accusers".

Up until the point of striking a Review Board, the process of registration and re-evaluation under the P.C.P. Act and Regulations does not fit this court-like model. It is highly unlikely that the process up to the point of a commencement of a Review Board could be characterized as adversarial or formal, at least not in the sense that we normally think of a court-like proceeding. However, it can be readily illustrated in the experience of thealachlor review that once the Review Board was established, the nature of the procedural obligations, including those of the Minister, was significantly altered. Prior to the establishment of the Board, the Minister, as part of the ongoing process of registration and re-evaluation of pesticides, consults with his own departmental staff, with other Ministries and even with provincial Ministers.⁶² However, it is apparent from the judgment of Collier J. that, once the Minister received the advice of the Review Board, a decision-maker which had engaged in a formal, court-like procedure, the Minister himself fell subject to fresh procedural constraints. In this sense, procedure begets procedure in judicial review of administrative decisions.

Ironically, some readers may find that the logical conclusion to be drawn from the discussion of this point is that further procedural obligations can be avoided by providing no procedure at all. It may well be the case that the gratuitous extending of some procedure will give rise to an argument that since some procedure is provided, it ought to be a fair one. However, the emphasis here must be on the word "gratuitous". If there is an independent ground, such as the consequences for affected parties or the function of the decision-maker for making a claim to procedural fairness, then a failure to address the issue as explicitly as possible may only be an invitation to more wholesale judicial revision. In any event, it ought to be recognized that the provision in the

P.C.P. Act and Regulations for the establishment of review boards and the associated provisions with respect to hearings, evidence, reasons for decision, etc. combine to provide the foundation for a compelling argument that, at least from the point of the striking of a review board, the whole decision-making process, including the ultimate decision of the Minister, is subject to a duty of procedural fairness.

(iii) The Minister's discretion

The third factor to be considered is the characterization of the Minister's function. This issue is sometimes stated as: "Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?"⁶³ In the context of registering and re-evaluating pesticides under the P.C.P. Act and Regulations, the Minister decides both broad policy questions and individual cases based on specific facts. The best approach is to analyze decision-makers as if they could be placed upon a spectrum with broad political questions at one end and specific, non-discretionary cases at the other. Some familiar illustrations of decisions involving broad policy questions would be the appointment of heads of crown corporations or the purchase of a battleship.⁶⁴ An illustration of a broad policy question closer to licencing context would be a policy requiring drivers to surrender their licenses upon reaching the age of eighty-five or the cancellation of a commercial salmon fishing season for conservation purposes. At the other end of the spectrum in the licencing context would be the revocation of a permit for some misconduct or misfeasance on the part of the holder. For example, in a recent Alberta decision challenging the refusal of an application for membership in a professional association, it was

concluded that there was a duty of procedural fairness. The following passage is significant:

It may be that the nature of the process does not require a full hearing to be given to each applicant and that rules of procedure be followed and that a transcript be obtained, but certainly each applicant must be given the opportunity to satisfy the council as to his or her good character, education and experience.⁶⁵

In another decision, even more germane in the P.C.P. Act context, the Supreme Court of Canada held that the Minister of Transportation for Ontario had a duty to act fairly when refusing an application to transfer a temporary extra-provincial trucking licence. The significant factor in the characterization of the decision as one requiring procedural fairness was that the Minister required proof of the financial stability of the applicant but that by refusing the applicant an opportunity to make further submissions, the Minister placed the applicant in an impossible position, or, to use the words of Laskin C.J.C. "a 'catch 22' position."⁶⁶ There were two other factors emphasized in the judgment of Laskin C.J.C.: that the applicant, through its solicitor, had requested an opportunity to make submissions; and, that: "There is no doubt ... that the Minister, as a statutory authority, was bound to act fairly in relation to an applicant having an economic stake in his decision."⁶⁷

The Minister of Agriculture, acting pursuant to the P.C.A. Act and Regulations must take account of a combination of public policy concerns and factors specific to individual applications. The Minister shall register a control product,⁶⁸ subject to the criteria of section 18 of the Regulations. Some of these criteria are routine issues of compliance with the Act or Regulations. Some are more open-ended concerns of the merit or value of the product for its claimed purposes. The most open-ended question is that of unacceptable risk, including risk of harm to public health. While these criteria

are increasingly open-ended in nature, they are all product-specific. And, insofar as a decision by the Minister is based upon concerns specific to a particular product or active ingredient, the argument for a duty of procedural fairness is a compelling one. Turning from the duty owed to the registrants to that owed to either user groups or general public interest groups, the Minister would more likely be seen in the latter case to be basing his decision upon considerations of "social and economic policy in the broad sense". Accordingly, it is not likely that those latter groups can claim an independent entitlement to have the Minister initiate some proceeding if none is otherwise contemplated.

Conclusion re: right to a hearing

Pulling together the analysis of the three factors above, there seems to be a consistent theme emerging. It is highly unlikely that the Minister can escape being required to grant some kind of "hearing" to registrant/applicants. If no procedure is provided for, it is almost a certainty that some will be forced upon the Minister by the courts on judicial review. If no indications of the type of procedure contemplated by the legislature are to be found in the legislation or the regulations, the procedure imposed is likely to be of a judicial type, i.e. some kind of hearing with some of the trappings of a court-like proceeding. It is possible that the Regulations could be amended to make it clear that no "hearing" is contemplated for the refusal or non-renewal of a temporary registration and that this lack of a "hearing" would not be seen to be inconsistent with procedural fairness. If the legislation went further and stated that no procedure were required for decisions with respect to cancellation or suspension, there would likely be a constitutional problem. As was noted earlier, section 2(e) of the Canadian Bill of Rights guarantees that decisions

with respect to "the determination of rights and obligations" shall be taken in accordance with fundamental justice. There is little doubt that the cancellation or suspension, and probably the refusal, of the registration involves a decision with respect to "rights and obligations". Accordingly, the question of the appropriate procedure must be confronted at some point in the legislation or the regulations.

As a matter of the bottom line, the Minister does owe a duty to be fair to registrants/applicants when dealing with suspensions, cancellations, renewals and probably when dealing with initial registrations. Such a duty can be avoided in the case of a temporary registration. As far as other parties are concerned, they will have a strong claim to be included whenever the Minister undertakes a process to deal with the registrant/applicant and it can be shown that the central issue relates to their concerns. It is unlikely however that they will be able to mount an independent claim of a "right to be heard".

II. A. 2(b) What kind of hearing?

Now that the question of a duty of fairness simpliciter has been dealt with, the more intriguing issue is the content of procedural fairness. Just what must the Minister do to comply with his obligation to be procedurally fair? It was noted in the earlier discussion that the procedure undertaken by the Alachlor Review Board was very much in the judicial mode, involving counsel, testimony from witnesses and even an opportunity to cross-examine witnesses. The Minister, on the other hand, in the process leading up to the decision to cancel the registration, engaged through departmental officials in a much more fluid, back-and-forth, technical exchange with Monsanto. After the Review Board recommendation was received, the Minister found that a more formal approach was

required, not a full hearing but a letter to participants in the Review Board hearing indicating what post-Review Board contacts he had made and asking for any further submissions. At this stage the question is how much of this formality will the common law (or perhaps the constitution) insist upon as a minimum standard of procedural fairness?

The standard which the common law imposes is a flexible one. To say that a duty of procedural fairness is owed is not to make a claim for a full adversarial, evidentiary hearing with counsel. In his reasons for judgment quashing the Minister's decision, Collier J. went only this far:

I agree with the submission of counsel for Monsanto, that once the Minister decided to go beyond the report, and take into account other material not before the Board, then there was a duty to inform Monsanto, and perhaps others, and to afford an opportunity of response.⁶⁹

In Nicholson v. Haldimand-Norfolk, the ground breaking Canadian case on the emergence of a duty of procedural fairness, Laskin C.J.C. conceived of fairness as "involving something less than the procedural protection of traditional natural justice."⁷⁰ Indeed it was left open by the Court in Nicholson as to whether the opportunity to respond needed to be oral or in writing. It was, according to Laskin C.J.C., a matter of devising a procedure whereby the Board would "be certain that it had not made a mistake in some fact or circumstance which it deemed relevant to its determination."⁷¹ In its most recent decision dealing with duty of procedural fairness in prison disciplinary matters, the Supreme Court has recognised that "the process of prison administration, because of its special nature and exigencies, should not be unduly burdened or obstructed by the imposition of unreasonable or inappropriate procedural requirements."⁷²

It is one thing to acknowledge that procedural requirements ought not to be unduly formal; but it is another matter to accept that administrative efficiency

will, by itself, override concerns which give rise to demands for fair procedures. For example, in the Supreme Court decision just mentioned, notwithstanding the expression of concern that prison administration not be unduly burdened, the Court did require the Director "to inform [the disciplined inmates] of the reasons for his intended decision and give them an opportunity, however informal, to make representations."⁷³ In Quinn Truck Lines, the Supreme Court judgment quashing the decision of the Ontario Minister of Transportation not to permit the transfer of a temporary extra-provincial trucking licence, Laskin C.J.C. referred to a suggestion that it would be administratively impractical for the Minister to receive further submissions as an "intruded consideration". In the words of Laskin C.J.C.:

If administrative difficulties are at all relevant here, they would, in my view, go to the arrangements for a hearing to receive additional evidence and not to the substantive question raised by the appellant.⁷⁴

In the Supreme Court's first major consideration of section 1 limits to principles of fundamental justice, it was argued that the requirement of an oral hearing in every case to redetermine refugee status would constitute an unreasonable burden upon the resources of the Immigration Appeal Board. In responding to the claim that administrative inefficiency ought to be the basis for a section 1 limitation, Wilson J. said:

Seen in this light I have considerable doubt that the type of utilitarian consideration brought forward by Mr. Bowie can constitute a justification for a limitation on the rights set out in the Charter. ... No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles.⁷⁵

Thus the process of considering minimum standards of procedural fairness begins with these two propositions. First the procedural requirements must be sensitive to the administrative context and must be careful not to impose obligations which are more formal than necessary. Second, once it is decided that a particular procedure is appropriate, further arguments about cost and administrative efficiency become of doubtful relevance, or perhaps become redundant.

The most effective way of posing the question of the Minister's obligations is as follows: "If there were no Review Board and the Minister decided to cancel, suspend or refuse registration of a pest control product, what procedural obligations would be imposed as a matter of common law fairness or, on constitutional terms, if necessary, as a matter of fundamental justice pursuant to the Bill of Rights or the Charter?" More specifically, the issue can be posed in terms of specific elements of procedure. Must there be an in-person hearing? Must there be cross-examination? Counsel? Reasons for decision?

(i) An oral hearing

The first question is whether there needs to be an oral hearing. In Singh, both Beetz J. and Wilson J. concluded that an oral hearing was necessary for determination of refugee status. Wilson J. stated that for decisions involving death, physical liberty or physical punishment, it "would seem on the surface at least that these are matters of such fundamental importance that procedural fairness would invariably require an oral hearing."⁷⁶ Wilson J. went on however to concede that "written submissions may be an adequate substitute for an oral hearing in appropriate circumstances."⁷⁷ According to Beetz J., the most important factors in the granting of an oral hearing are "the nature of the legal rights at issue and the severity of the consequences to the individuals

concerned.⁷⁸

In a recent decision, the Federal Court has denied an oral hearing in the determination by the National Parole Board of an application for day parole. In MacDonald v. The National Parole Board it was said that no oral hearing was necessary since there was no accuser to be faced by the applicant, since the applicant was "fully apprised" of the material in the file, and since "what is at stake in an application for day parole is very different in nature and degree from what is at stake in the determination of refugee status."⁷⁹ Finally, and most significant for purposes of pesticide review proceedings, Muldoon J. held that no oral hearing was necessary since the applicant controls the file:

The applicant's progress in prison, the behaviour or misbehaviour, and the initiation of the application for day parole are all in the applicant's hands. The applicant needs no right of oral presentation or of reply in person since it is his application alone, including the favourable case management reports in this case, which are before the Board. Content with the documentation, the applicant made no further submissions. In these circumstances the lack of an oral hearing is quite unexceptionable. It certainly does not transgress on the principles of fundamental justice.⁸⁰

There is a striking parallel between this characterization of the application for day parole and the process by which an application is generally made for registration of a pest control product. So long as the process can be characterized as one where the registrant/applicant is fully aware of the contents of the file and even has a substantial degree of control over the file, it would seem reasonable that the same argument as was accepted by Muldoon J. should be accepted on the question of whether fairness requires an oral hearing in the pesticide context.

There are now a number of cases holding that an oral hearing is required for parole revocation. Among the functional reasons for this procedural requirement is the concern that, unless the prisoner whose parole is being revoked can be

present, the Board's word will have to be taken that it acted fairly.⁸¹ Other justifications for the oral hearing are that it furnishes "some humane consideration" when returning the parolee to custody. Also cited is the possibility that some explanation or submissions in exoneration or mitigation may be offered. None of these considerations seems to have any particular bearing upon the need for an oral hearing in a decision to cancel or refuse registration of a pesticide. The factor of the "humane consideration" would not apply with the same force. To the extent that parole revocation involves a judgment about the character of an individual, this would not pertain to the presumably expert and technical consideration of the merit or safety of a pest control product. Indeed one might go further and suggest that considerations of personality and character are not appropriate in pesticide registration or re-evaluation. On balance it is difficult to make an argument from procedural fairness or natural justice that affected parties must have an in-person hearing simply because of a sense of humanity, or because it is a necessary check on the decision-maker (in this case the Minister), or because the affected parties cannot otherwise respond to the "case against them" or make submissions.

(ii) Cross-examination?

One potential rationale for holding an oral hearing to determine the safety or merit of pest control products is that it will present an opportunity to test, through examination and cross-examination, the credentials and the reliability of scientific experts and data. This, however, will depend on the availability of viable alternatives to cross-examination. There is not much basis in Canadian case-law to argue that the opportunity to cross-examine constitutes an essential element of natural justice or procedural fairness. In a context bearing some

considerable similarity to that of the P.C.P. Act and Regulations, the Alberta Court of Appeal has held that cross-examination is not a necessary element of procedural fairness. It will be sufficient to meet the requirements of natural justice if a party "is afforded an equally effective method of answering the case made against him, in other words, is given 'a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice'".⁸² In the Alberta case, which involved an appeal from a decision of the Provincial Planning Board approving an amendment to the Edmonton Metropolitan plan, one of the controversial elements was the admitting into evidence of a study of the pollution effects of the plan amendment. The scientist who performed the study was not available for cross-examination but the Board had ruled that the Report be admitted along with a document stating the scientist's qualifications. The Board invited written answers to the Report and adverse parties did in fact submit two written critiques by experts in the field. According to the Court of Appeal, this constituted taking full advantage of the opportunity to correct or contradict the Report in question. This decision has considerable relevance to the issue of whether cross-examination is required as an element of procedural fairness in making decisions with respect to pest control products.

The registration, renewal, cancellation or suspension of a pest control product is an expert decision. It turns on scientific and economic data to be assessed in a professional fashion. It is a matter of one expert's scientific conclusions or data being challenged, not by means of the cut-and-thrust of cross-examination but by the considered critique of another expert opinion or a competing set of data. The decision-maker is not a jury of lay persons attempting to draw conclusions as to the historical facts based on oral testimony with the benefit of burdens of proof. Instead the decision-maker is a

politically accountable Minister of the Crown acting on the advice of the best available professional advisers from various government departments. When, in the alachlor hearings, the matter passed from the Minister to the Review Board, the selected decision-makers were experts in various fields, including toxicology, risk assessment, agricultural economics and biochemistry. This decision-making process and these decision-makers stand to gain little from a court-room procedure. Indeed it is conceivable that they can better proceed in a deliberate, non-court-like fashion. The typical process for the registration and re-evaluation of pest control products requires time; it involves a studied back-and-forth exchange of data and responses between interested parties, particularly applicant/registrants, and government officials. A process which requires months, often years, of data generation and analyses is ill-suited for a one-shot resolution in an adversarial setting, and is particularly ill-suited to the testing of complex scientific issues through cross-examination.

If this characterization of pesticide registration and reevaluation is a valid one, what does the common law require as a matter of procedural fairness, or the constitution require as a matter of fundamental justice? In all likelihood the minimum requirement is that parties, particularly parties with an economic stake in a decision, must have notice of any information upon which the government proposes to act and that there be an opportunity to respond, an opportunity to submit further information and to test or challenge adverse information. It may be that occasions will arise when a controversial issue can best be resolved through a formal proceeding complete with the opportunity to test the empirical basis for and the credibility of opposing views. If such a flexible approach is adopted (i.e. cross-examination if necessary but not necessarily cross-examination) considerable care will need to be taken in

drafting the appropriate provisions. There is, for example, a Supreme Court decision in Innisfil v. Vespra which holds that any provision for a "hearing" presumptively includes a right to cross-examination:

[W]here the rights of the citizen are involved and the statute affords him the right to a full hearing, including a hearing of his demonstration of his rights, one would expect to find the clearest statutory curtailment of the citizen's right to meet the case made against him by cross-examination.⁸³

It should be noted however that in the Innisfil case there was a serious dispute as to a factual matter and there was very much an adversarial relationship between the two municipalities. A contrasting decision by the Federal Court of Appeal has held that cross-examination is not essential to a "public hearing" where subscribers of a cable television licence-holder oppose increases in subscription rates. According to the Federal Court of Appeal, the denial of cross-examination did not result in a failure "to permit the applicants to exercise their rights as members of the 'public' under the statute."⁸⁴ So the question of the importance of cross-examination, and of the likelihood of it being imposed as a matter of statutory interpretation, common law or the constitution is very much a functional one. What is the utility of cross-examination? What are the alternatives? What is the custom of the decision-maker?

Unless an unusual case arises where there is a combination of controversial facts, issues of credibility and public concern about the impartiality or the judgment of the decision-maker, it is doubtful if the Minister of Agriculture would be required as a matter of common law or of constitutional "fundamental justice" to hold an oral hearing with the usual trappings of a court-like procedure. It seems fairly elementary that the Minister will be held to a requirement to give notice to affected parties, including disclosure of

sufficient information to permit representations to be made. The issue of giving reasons for decision will be discussed later in the paper.

If the inference to be drawn from this discussion is that the Minister can resolve all of the problems encountered in the course of the alachlor hearings by simply repealing the sections of the Regulations relating to the hearings and the establishment of Review Boards, several caveats must be attached. First, as was noted earlier, it ought not to be assumed that this is simply a matter of making explicit provision in the legislation or by regulation; these questions are capable of being turned into constitutional issues. Second, if all that is done is to repeal the provisions of the Regulations which provide for a Review Board and no attempt is made to create a functional substitute, it would not be unreasonable for a court to draw an inference that this is solely a cost-cutting and time-saving measure, not one based upon responsible administrative decision-making. That inference would be supported by the continued presence of section 5(d) in the P.C.P. Act, providing that the Governor in Council may make regulations respecting procedure to be followed in cases of cancellation, suspension or refusal of registration. Moreover, this same inference would be supported by the presence in the Regulations, for a fifteen-year period, of the Review Board mechanism. This provision, combined with section 5(d) of the Act, almost amounts to a confession on the part of Parliament and the executive branch that some formal procedure is due. The third caveat against a simplified response is that reviewing courts have typically accepted informal procedures as a fair alternative to a full-blown process where the informal procedure has been elaborated and deliberately adopted. Where a decision-maker is taking decisions which have serious consequences for individual citizens and where no procedure at all has been devised by the administration, the natural response of the courts

has been to require a "hearing", ostensibly with its full adversarial trappings.

In conclusion the Minister has a duty to be fair, initially to applicant/registrants but, as the decision-making process advances and the Minister develops a procedure for dealing with applicant/registrants, there will almost inevitably be a duty to be fair to, and to develop procedures for, other interested parties such as users or environmental and public health interest groups. What is also clear though is that the provision for a Review Board not only introduces the formality to that particular proceeding but contributes significantly to the characterization of the Minister's post-Review Board function as being of a "judicial" type, hence as one requiring more procedural formality. At this point it is appropriate to consider another doctrinal difficulty for the Minister which is brought about by the creation of and the formal characterization of the Review Board.

II. A. 3. Problems of Bias

One problem which was not raised in the alachlor hearings is that of a reasonable apprehension of bias. It may be that the necessary strategic interests did not coincide in that case to warrant the raising of the issue but, for the purposes of this Report, it cannot be overlooked. There is serious cause to believe that, as the scheme is presently structured, there are two respects in which a question of bias could be raised. The first is in the selection of the Review Board. If the Minister appears before the Review Board in an adversarial capacity, or even if the Minister has an interest in the outcome of the hearing, then his role in the selection of the Board may very well constitute a problem. Second, there may be some objection to the Minister's ultimate decision-making authority since he has already made the initial decision, and appeared as a party

before the Board reviewing that decision. The resolution of this issue too will depend on how the function of the Minister is characterized.

(i) The appointment of Review Boards

Just as was seen above in the discussion of judicial review for procedure, the world is changing in terms of judicial review for bias. At common law, it would probably have been said that no problem was presented, or at least that nothing could be done, since the legislation authorizes the "conflict" of roles. After all, s.18 of the P.C.P. Regs. gives the Minister the power to refuse registration; s.20 grants the authority to cancel or suspend registration; s.24 says that the Minister "shall appoint a Review Board"; and s.25 says the Minister may take action on the recommendation of the Review Board.

A common law decision declining to make a finding of bias in a comparable context may be seen in a 1974 case involving Ontario securities regulation. A challenge was made to the participation of members of the O.S.C. in an inquiry hearing where some of the same members had initially ordered the investigation. Furthermore, they subsequently considered the investigator's report and ordered a "show cause" hearing which could have resulted in the suspension or cancellation of the registration of the affected parties. The same members of the O.S.C. were to preside at the hearing. The claim of bias was responded to by Dubin J.A. in the following manner:

In the instant case, the Commission is by statute the investigator, the prosecution and the judge. Where a statute by its terms or by clear implication precludes the introduction of a common law rule and where the imposition of such a rule would frustrate the will of the Legislature or of Parliament as expressed in the statute, the Court is not free to insist that the common law rules prevail, however inviting it may be for a Court to do so.⁸⁵

A comparable situation, challenging a "two-stage" inquiry, has arisen with

respect to human rights tribunals, where the statutory scheme requires the Commission to conduct a preliminary inquiry and try to effect a settlement, and, if no settlement is reached, to proceed with a formal inquiry before the Commission. In denying a challenge claiming bias against the Saskatchewan Human Rights Commission, Culliton C.J.S. said: "If any injustice resulted ... the fault therefor lies with the legislature and not with the Commission."⁸⁶

The common law deference to legislatively imposed duplication of or overlapping of functions may possibly not extend to situations where the overlap is imposed by regulation, particularly where the regulatory power is granted in such general terms as is done by s.5 of the P.C.P. Act. However, that would be an argument that the regulations were ultra vires, not that the "bias" itself was a basis for obtaining judicial review.

More to the point is the recent revival of the Canadian Bill of Rights and the raising of the prospect that such legislatively imposed schemes are now subject to constitutional challenge. Under the Canadian Human Rights Act, when the Commission receives a complaint, it appoints an investigator who reports to the Commission, which must make a finding that the complaint is "substantiated". If such a finding is made, the Commission then appoints a Human Rights Tribunal. Finally, the Commission acts as prosecutor before the Tribunal. This scheme has now been the subject of a successful challenge and has been found to be in violation of the guarantee of s.2(e) of the Canadian Bill of Rights that a person shall not be deprived of a fair hearing in accordance with principles of fundamental justice when his "rights and obligations" are being determined.⁸⁷ The scheme was found to be offensive in two respects: first, the Commission has to decide if the complaint was substantiated before the Tribunal had an opportunity to consider the case independently; and, second, and more

significantly, there was "a direct connection between the prosecutor of the complaint (the Commission) and the decision-maker (the Tribunal)".⁸⁸

It may be possible to argue that the decision to be made by a Review Board, or the role of the Minister of Agriculture before a Review Board, is distinguishable from the function of human rights tribunals. But it will not be an easy argument to make. One has only to look at the listing of counsel in the Report of the Alachlor Review Board. The two counsel listed first are Mr. Hughes for Monsanto and Mr. Hynes for Agriculture Canada and Health and Welfare Canada. The Minister has a stake in the outcome: to see his initial decision validated. It is the Department, or the federal government, which has the information and the resources to carry forward the case in favour of cancellation, or, to put it another way, the case against registration. The Minister may claim that his counsel is there only in the public interest. But that does not get one very far. So too is the Attorney-General appealing in the public interest, parens patriae, in a criminal prosecution. There can be little question that the Minister of Agriculture holds an adversarial stake in the proceedings of a Review Board. And, even if the Minister did not send counsel to the hearings, there would still be the fact that it is the Minister's decision which is being "reviewed". Surely it raises a reasonable apprehension of bias for the decision-maker appealed from to select the reviewing judge. It seems highly unlikely that the Minister could ever argue that his involvement is such that no problem is raised by his selection of the panel.

A second line of argument might be to contend that the Review Board performs a different function from a Human Rights Tribunal. The argument must be that the Review Board does not adjudicate, that it does not resolve a lis inter partes where it must treat both sides impartially. But, once the Minister has made a

decision to refuse, suspend or cancel registration, it will be difficult to characterize the Review Board's function as substantially different from the resolution of a lis inter partes. Admittedly, the criteria for decision involve a considerable element of public policy or public interest but, in many respects, that only confirms the importance of the power of selection. As for a suggestion that the Review Board is different because it only recommends, that line of analysis does not carry as much force as it once did.⁸⁹

So it appears that the Minister may encounter a constitutional problem because of his role in selecting the members of the Review Board. There is a reasonable apprehension of bias. Reasonable persons could have an apprehension that panel members might be influenced by a desire to be appointed another time. It is not unreasonable to assume that they appreciate the opportunity to serve; otherwise they would not accept the invitation. Even if it were unreasonable to apprehend that panel members aspired to serve on a subsequent Review Board, there is still a reasonable apprehension that the Minister is able to identify and select Board members who are sympathetic to his point of view in the first place.

So what can be done to avoid the problem? The Canadian Human Rights Act has been amended to establish a Human Rights Tribunal Panel, independent of the Commission. The President of the Panel appoints a Tribunal to inquire into a complaint if requested to do so by the Commission.⁹⁰ Also, the Commission is no longer required to find that a complaint is "substantiated", only that the Commission is "satisfied that, having regard to all the circumstances of the complaint, an inquiry thereinto is warranted".⁹¹ It is likely that some comparable change would be needed in the P.C.P. Regs. to avoid a challenge at some point in the future to a Review Board appointed by the Minister. One way of dealing with the problem would be to turn the task of appointing Review Boards

over to the Pest Management Advisory Board, since the PMAB is already established and ought to be perceived as being sufficiently independent from Agriculture Canada to avoid any further apprehension of bias.

(ii) The Minister's "predisposition"

The more difficult issue for the Minister may be his involvement at all three "phases" of a decision to refuse, cancel or suspend a registration. The Minister makes the initial decision, appears before the "Review Board", and then "decides" again when the advice of the Review Board is received. This multiple-stage involvement is a classic case giving rise to a reasonable apprehension of bias. Indeed it seems to fall directly afoul of the rule that no one shall be judge in his own case.⁹²

An eloquent statement of the apprehension which arises from such a multifaceted involvement is the dissenting judgment of Laskin C.J.C. in French v. Law Society of Upper Canada.⁹³ In that case the Discipline Committee of the Law Society heard complaints against a member of the Society and found that seven of the complaints were established. They recommended suspension from practice for three months. The report of the Discipline Committee was submitted to Convocation and at a meeting in which members of the Discipline Committee participated the decision was to be made. The majority of the Supreme Court found the dual function to be authorized by the legislation and also found that the Discipline Committee acted as an investigation or fact-finder, not as a prosecutor. According to Laskin C.J.C., however:

The important consideration in the present case which, in my view, overrides the characterization of the disciplinary proceedings as either a two-stage procedure or as involving judicial review is that the Disciplinary Committee did not merely make findings of fact but drew conclusions of guilt of seven of the complaints laid against the solicitor.⁹⁴

There can be no argument in the case of the involvement of the Minister of Agriculture with pesticide registration that the first decision is a determination, a conclusion. If there were no decision by the Minister, there would be no Review Board.

Another case, presenting a context closely parallel to that established by the P.C.P. Regs. recently arose in Nova Scotia in the university tenure context. The President of the Mount Saint Vincent University, on the advice of the University Committee on Appointment, Rank, Tenure and Promotion, denied tenure to an assistant professor. Following the University's Faculty Manual, the matter then went to an Ad Hoc Appeal Committee, which consists of three members. One member of the Committee is selected by the faculty member, one by the President or her designate, and the two then select a chairman. The President of the University attended the meetings of the Ad Hoc Appeal Committee and took part as a witness. The Committee, by a majority, recommended to the President that tenure be granted. The President, taking account of both the original recommendation of the University Committee and the advice of the Ad Hoc Committee, decided not to accept the recommendation of the latter. The argument about bias was dealt with by Rogers J. in the following fashion:

The effect of this whole elaborate process was that the President of Mount Saint Vincent University was sitting on appeal from her own decision. The Ad Hoc Appeal Committee was a mere cyphen in the process -- window dressing in a flawed procedure euphemistically referred to as an appeal.⁹⁵

It will be readily recognized that the sequence of events and the involvement of the President in the above decision is almost identical to the involvement of the Minister of Agriculture in the scheme established by the P.C.P. Regs.: a decision, followed by the appointment of an ad hoc "appeal" board, in which appointment the initial decision-maker has a hand; then a hearing

at which the initial decision-maker appears as a party; then a decision from the appeal body in the form of a recommendation to the initial decision-maker; then, an ultimate decision by the initial decision-maker. The conclusion of Rogers J. in Thomas is compelling: "[T]here could not help but be a reasonable apprehension of bias in this situation on the part of a reasonable outside observer".⁹⁶

It is possible that the Minister may be able to avoid the implications of this claim of a reasonable apprehension of bias by arguing that he is not acting in an adjudicative capacity. The argument would be that the Review Board stands only in a recommendatory relationship to him and that the advice of the Board is meant only to assist him in reconsidering his original decision. This however is a difficult argument to make since s.5(d) of the P.C.P. Act provides for a review of cases involving the refusal, suspension or cancellation of registration. The review referred to is not that of the Minister, but that of the outside Board. It is the registrant/applicant, not the Minister, which decides the "subject matter" of the hearing. The Board creates a record and sends a copy of its report containing its recommendations respecting the subject matter of the hearing and its reasons to the Minister and to the person who applied for the hearing. The role of the Board here is substantially different from that of departmental advisors such as the Pesticides Directorate in relation to the Minister. In the end the "merely recommendatory" argument is not likely to go far. After all, the Ad Hoc Committee in Thomas (supra) was also merely recommendatory.

It may be possible to argue that the Minister is not engaged here in resolving a dispute in the sense of a lis inter partes, but that he is making a political decision involving broad considerations of public interest. There are

a number of competing considerations however. First the registrant/applicant has a lot at stake. The significance of this factor has been discussed earlier in the context of hearing requirements. Second, the interposition of the Review Board itself tends to draw the Minister's function, particularly the post-Review Board phase, closer to a judicial characterization. Even if the decision is highly political, the establishment of an outside Review Board itself creates the impression that this is a specific decision to be made on the basis of recognized criteria. Finally, the common law doctrine of bias applies well beyond the strict context of a lis inter partes. There are many administrative decisions which have been successfully challenged for an apprehension of bias, where the problem did not arise from a predisposition in favour of one party to the detriment of another. The leading Canadian decision on administrative bias involves a decision-making context at least as political as the registration of pesticides. In Committee for Justice and Liberty v. National Energy Board⁹⁷ the Supreme Court of Canada disqualified the Chairman of NEB from sitting on a panel to consider a proposal to construct a natural gas pipeline in the MacKenzie Valley. While there may be some ground for attempting to distinguish an independent administrative agency from a politically accountable Minister, it cannot be said that the subject matter of pesticide registration is less "judicial" than the construction of pipelines. Indeed, it is patently more judicial than is a decision to approve in principle the construction of a pipeline.

It is highly unlikely that the present decision-making structure can be retained without the problem of bias due to the Minister's multi-faceted involvement eventually being raised to quash a decision to refuse, cancel or suspend the registration of a pest control product. There seem to be only two

options. First, eliminate some of the "facets" of the decision-making scheme of the P.C.P. Regs.; or, second, restrict the Minister to only one facet of the process. The effective means of carrying out the first option is to eliminate the Review Boards. As for the second option, the Minister's initial decision would be his only one and the matter would then be finally decided by a Review Board or some comparable independent body. These options will be further considered in Chapter III when a review of other problematic features of the existing scheme has been completed.

II. A. 4. Problems of Ministerial Information Gathering

It should not come as a surprise in our system of departmental government and Ministerial responsibility to learn that the Minister of Agriculture, before making a decision involving concerns of public health and wide-ranging economic issues, consults with departmental officials, with officials in other departments, and even with provincial governments, before deciding to accept or reject advice to renew the registration of a controversial pesticide. However, a successful challenge to the March 26 decision of the Minister of Agriculture in the alachlor proceedings has raised new questions regarding the procedure that a Minister must follow when receiving advice on such matters.

On March 26, the Minister wrote to the President of Monsanto informing him that the temporary permit would not be renewed. In the letter he included in his reasons for non-renewal: "[I]n view of advice received subsequent to the Board's report from Health and Welfare Canada and the Ministers of Environment from the provinces in which it is predominantly used, it is my decision that the continued use of alachlor represents an unacceptable risk of harm to public health and the environment." On April 8, the decision not to renew was quashed by an order in

the nature of certiorari issued by Collier J. of the Federal Court, Trial Division. According to Collier J.:

I agree with the submission of counsel for Monsanto that once the Minister decided to go beyond the report, and take into account other material not before the Board, then there was a duty to inform Monsanto, and perhaps others, and to afford an opportunity of response.⁹⁸

In response to the order quashing his decision, the Minister wrote to Monsanto and the other participants in the Alachlor Review Board enclosing copies of letters from the Minister of Health and Welfare Canada and from the Ministers of Environment in Ontario and Quebec and requested responses or further submissions from the parties. On May 5, having formed the view that there was no new information in the further submissions of the parties, the Minister confirmed his decision not to renew the temporary registration.

The decision of Collier J. raises two questions. First, how far does the Minister have to go in the post-Review Board phase to meet the requirements of procedural fairness. Second, what are the implications of the judgment of Collier J. for the procedure followed by the Minister in the pre-Review Board phase of his decision.

Dealing first with the post-Review Board phase, it is not evident from the reasons of Collier J. just what factors were central to the holding that the Minister had to disclose his contacts and receive responses. It is conceivable, though, that the critical element was that the Minister was acting on a recommendation from a Review Board which, both in terms of the procedure it adopted and in the terms of its place in the regulatory scheme, performed a highly "adjudicative" function. If the function of the Minister could have been characterized as legislative, it ought to follow from the decisions of the Supreme Court in Inuit Tapirisat⁹⁹ and Cardinal¹⁰⁰ that the Minister would have

no duty to disclose his contacts. In the Inuit Tapirisat decision, Estey J. rejected a claim that the Governor-in-Council had to read, either individually or en masse, the contents of the file on the appeal of the CRTC rate-making decision. He commented as follows:

The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council. The executive branch cannot be deprived of the right to resort to its staff, to departmental personnel concerned with the subject matter, and above all to the comments and advice of ministerial members of the Council who are by virtue of their office concerned with the policy issues arising by reason of the petition whether those policies be economic, political, commercial or of some other nature.¹⁰¹

There are, however, several significant differences between the decision of the Minister in this case and the function of the Cabinet in Inuit Tapirisat. First, there was doubtless a concern underlying the decision of the Supreme Court in Inuit Tapirisat that the imposition of additional procedural duties upon Cabinet for the conduct of appeals from the C.R.T.C. would mean that the power could not be exercised at all. It would amount to effectively striking down the appeal mechanism established by the legislation. At least in the case of the Minister acting under the P.C.P. Regs. there was a feasible procedure to respond to the judgment of Collier J. Second, the objection in Inuit Tapirisat was to reliance upon staff consultations or documents. In the Monsanto situation, the Minister of Agriculture went outside of his department and even outside of the federal government. Finally the link between the Minister of Agriculture and the Review Board is a direct one. The Board is set up to form an expert opinion, using the same criteria as the Minister himself would use, and convey its advice to the Minister. In this sense the Minister is more directly linked to the "judicial" type of proceeding undertaken by the Review Board than is the Cabinet to the CRTC in Inuit, where the Cabinet is an independent entity. While it is

true that the Cabinet serves an "appellate" function in relation to the C.R.T.C., these decisions are commonly, and not insignificantly, referred to as "political appeals".

The principle that a decision-maker ought to notify affected parties of information which is being considered and which may be adverse to the interests of the party is one of the most basic elements of natural justice or fairness. Where reviewing courts would never impose cross-examination or the right to counsel on the proceedings of a city council, there are precedents for requiring a council to disclose any material relied upon, including staff documents, in the reaching of a decision.¹⁰² This same principle has been held to override concerns about trade secrets,¹⁰³ concerns about confidentiality of sources in prison discipline¹⁰⁴ and even paternalistic concerns about the welfare of the individual who is the subject of the hearing.¹⁰⁵ Other instances of judicial review have found it to be inconsistent with procedural fairness to have reference to evidence admitted in an earlier proceeding,¹⁰⁶ or to "common knowledge" regarding racial violence in a refugee claimant's home country,¹⁰⁷ or even to technical dictionaries,¹⁰⁸ without disclosing the material to the affected parties and allowing an opportunity to respond.

What is significant is that all of these cases involve a hearing, a hearing where the decision-maker departs from "the record" to decide on the basis of information to which an affected party does not have access and has no opportunity to respond. It is this factor which stands out in the holding that the Minister of Agriculture acted contrary to principles of procedural fairness by engaging in further consultation without giving the parties an opportunity to respond. To use the words of Collier J., the problem began when the Minister "decided to go beyond the Report, and take into account other material not before

the Board". Once the Minister received the recommendation of the Review Board, he was perceived to be constrained by a record, that being the record amassed (in three days of receiving evidence) by the Review Board.

It can thus be seen that the interposition of the Review Board in the overall process of pesticide registration constitutes a significant constraint upon the decision-making exercise of the Minister. It is possible to conclude from the judgment of Collier J., with its emphasis upon the "material not before the Board", that the Minister is, after the Review Board hearing, limited to only the material led at the hearings, even though, as matters proceeded on the hearing re the temporary registration, neither the government nor the registrant had presented any toxicological data.

It may even be that, at the post-Board stage, the Minister cannot even rely upon staff documents or advice. It is implicit in a recent decision of the Federal Court of Appeal that staff documents will cause a problem of procedural fairness when they "amount to additional evidence" but not if they do not constitute "anything more than comments or suggestions by the staff on the material before the Board."¹⁰⁹ In another recent challenge to reliance upon staff documents, this time involving two reports prepared by staff for the Anti-Dumping Tribunal, the claim of a breach of natural justice was dismissed by calling a preliminary report "innocuous", consisting of material which was a matter of general or public knowledge and which was eventually brought out by other means at the hearing. A post-hearing report, consisting of a summary of and commentary on the evidence and submissions made at the inquiry, was said to be "simply part of the Tribunal's own internal decision-making process for which, of course, the Tribunal alone is responsible".¹¹⁰

If the standard which emerges from these two decisions is that the injection

of new evidence from staff will offend principles of procedural fairness while there will be no problem so long as staff input is restricted to comments upon the existing record,¹¹¹ this could still impose a substantial constraint upon the Minister in "considering" the recommendations of a Review Board and deciding what action "he deems advisable". Is the Minister, upon receiving the Report of the Alachlor Review Board, to be restricted to the sketchy factual data developed by the Board itself after the Department presented no data to the Board in the belief that risk was not an issue? This places the Minister in an invidious position, particularly since he has no control over the definition of the "subject matter" of the hearing.

The whole problem of what the Minister can consider after receiving the Report of the Review Board illustrates once again the critical effect of interposing the review process between the Minister's first decision to refuse, cancel or suspend and his ultimate decision. Up until the time of the decision to refuse, cancel or suspend registration the Minister has a duty to be fair, which probably means a duty to convey to the registrant the nature of the "case" which the Minister is considering and an opportunity to respond in some form, although not necessarily in an oral hearing. There is not, at this stage of the process, any concept of a record and, hence, neither is there any concept of contacts or evidence or discussion which would be outside the record. So long as a fair opportunity is given for a party to have input into the Minister's decision, to respond on the issues which are of concern to the Minister and to challenge material which is adverse to its interest, the requirements of procedural fairness ought to be satisfied.

However, at the post-Review Board phase, the matter is a good deal more complex. It is conceivable that the Minister may have to even disclose staff

contacts. At some point this problem of post-Review Board disclosure could undermine the entire concept of Ministerial decision-making. After all, a reasonable armchair observer could be forgiven for suggesting that the Minister's decision is highly unlikely to be made without a specific recommendation from the Pesticides Directorate and that the Minister is highly unlikely to go against that recommendation.

If the principle of disclosure is pushed no further than it was by the decision of Collier J. and its aftermath, there is not yet a critical problem. If it is extended so that Ministerial decision-making becomes unwieldy or even impossible, there are, as was seen in the discussion on bias, two options: get rid of the Review Board, or get rid of the Minister.

II. A. 5. The giving of reasons for decision

Pursuant to section 21 of the P.C.P. Regulations the Minister must give reasons for his decision to refuse, cancel or suspend registration of a pest control product. As an example of the practice, in the alachlor proceeding the Minister made reference in his letter of February 5, 1985 to "expressions of concern from Health and Welfare Canada regarding the potential cancer risk associated with alachlor, primarily from exposure to persons working with the chemical". Reference was also made to possible dietary exposure. This letter was written against the backdrop of extensive consultation between Monsanto and Agriculture Canada; indeed it opened with the words: "You are already aware ...". Although not strictly required to do so by the Regulations (section 25 (3) requires the Minister to "notify the person who applied for the hearing of any action so taken"), the Minister, in his letter of March 26 and his letter of May 17, outlined to Monsanto the basis for his decision not to renew the temporary

registration.

At common law, there is no general duty arising from procedural fairness for an administrative decision-maker to give reasons.¹¹² It has been possible, in some cases, to infer a duty to give reasons from the existence of an appeal provision; the argument is that one must know the motivation for the initial decision in order to carry out a meaningful appeal.¹¹³ For example, even if no duty to give reasons were imposed by section 21 of the P.C.P. Regulations, it might be argued that there is an implicit duty to give reasons in order for the applicant/registrant to define the issue before the Review Board. In this sense the duty relates more to disclosure in order to permit one to "know the case against you" and to prepare to respond than it is related to a basic need to know or to ensuring rational decision-making.

There has, in recent years, been an increasing emphasis upon the giving of reasons for decision, not as an element of preparing the case against you, but as a regular facet of rational administrative decision-making. These obligations have been created, not so much as part of the common law duty to be fair but through the work of law reform commissions and through legislative initiatives. For example the duty to give reasons has been imposed by general procedural statutes in Ontario¹¹⁴ and Alberta¹¹⁵. It has also been recommended by the Manitoba Law Reform Commission¹¹⁶ and the Law Reform Commission of Canada¹¹⁷ in reports on administrative procedures that the providing of reasons for decision ought to be a regular administrative practice. The Law Reform Commission of Canada recommends that reasons for decision be given whenever the decision amounts to a total or partial denial of a requested action, or is otherwise adverse to the interests of a participant¹¹⁸.

The Supreme Court of Canada has commented that the development of a duty to

give reasons is "a salutary one"¹¹⁹. In the view of the Court, a duty to give reasons reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative decision-making, and allows affected parties an opportunity to consider possible grounds for review or appeal.

A commentary which is of particular relevance to the context of environmental assessment comes from the Chair of the Ontario Environmental Assessment Board who speaks positively of that Board's experience with giving reasons and takes the general position that: "[O]ne of the most important safeguards in the hearing process is the requirement of an administrative tribunal to give written reasons for decision"¹²⁰. Still closer to home is the recommendation of the Salter Report that pesticide decisions, including a short rationale, a synopsis of the assessment and an indication of substantive concerns, be published in the Canada Gazette and be made available through a departmental mailing list¹²¹. The provision of a detailed rationale is now part of the process of many federal administrative decision-makers, including the C.R.T.C., the Canadian Transport Commission, the Public Service Staff Relations Board and the Immigration Appeal Board.

There seems to be little compelling reason, from a functional point of view, for declining to give reasons for decision. This is not a case where there are so many routine decisions that the writing of reasons would become unreasonably time-consuming. By the time the decisional point of the process is reached, it ought to be only a matter of providing for parties a synopsis of factors of which at least the registrant/applicant will already be aware. If there is some potential drawback from a departmental point of view, it is that the giving of reasons may render the decision more vulnerable to review. If it were not for

the Minister's March 26 letter to Monsanto, it would have been very difficult to get before Collier J. the facts which proved critical in the judicial review proceeding quashing the Minister's decision. Whatever appeal this argument may have from a departmental point of view, it is hardly an appropriate basis upon which to decline to extend a basic measure of procedural fairness. To accept this argument would be tantamount to saying that an aspect of fairness ought to be withheld because of the risk of disclosing other examples of unfairness or possible ultra vires acts.

There is some evidence of an emerging recognition of a duty to give reasons for decision as a component of procedural fairness¹²². There is even evidence that it may be treated as being constitutionally required to accord with fundamental justice. A recent British Columbia Supreme Court decision has struck down a provision in the Vancouver City Charter which gave Council the discretion to "grant, refuse, revoke or suspend a licence without stating any reason therefor" as being in violation of principles of fundamental justice¹²³. The context of the B.C. decision, that being the refusal of a licence to carry on business as a hotelier, could hardly be more pertinent to the question of whether there ought to be a duty to give reasons when dealing with pesticide regulations. Whatever the evidence of an emerging common law or constitutional obligation, it cannot be denied that the obligation to give reasons for decision has become a standard feature of administrative decision-making, particularly among federal decision-makers, and there are no compelling arguments against the giving of reasons by the Minister of Agriculture when acting to refuse, cancel or suspend registration of a pest control product.

This raises the question of what ought to be the content of a duty to give reasons. How much detail or reciting of the background is necessary? It is

difficult to deal with this question in the abstract. The Supreme Court has held that: "It is not enough to assert, or more accurately, to recite, the fact that evidence and arguments led by the parties have been considered".¹²⁴ The reasons must at least disclose enough of the factual base and the motivation for the decision to permit an affected party to reach a judgment as to whether the decision-maker has responded to the essential questions or whether the action may even be ultra vires. Obviously it is not necessary for the Minister to rehearse all of the details of an extensive relationship which has been described earlier in this paper as "quasi-institutional". It may be a problem however to simply say to a party: "As you have known for some time, I am not happy about the risk of harm created by your pest control product and I have decided to cancel your registration". Surely a party, which then has the responsibility of effectively defining the mandate for the Review Board, is entitled to a more clear signal about the precise concerns of the Minister. The Salter Report recommends that reasons consist of a synopsis of the assessment and an indication of substantive concerns.¹²⁵ This seems to be an appropriate standard for an initial refusal, cancellation or suspension. What is necessary for Ministerial action subsequent to a Review Board recommendation will depend upon the amount of controversy likely to be generated. Where the Minister differs from the recommendation of the Review Board, it seems that the obligation to explain is greater than where the Minister more or less concurs in the Review Board's findings and recommendations, which will already have been circulated.

To conclude, the existing obligation for the Minister to give reasons for decision falls safely within any common law requirements and goes further to accord with prevailing administrative practice. There appears to be no reason for concern with the feasibility of giving reasons and, accordingly, no reason to

recommend any change from the status quo.

II. B. Public Participation in the Registration Process

The registration and re-evaluation of pest control products is a subject matter in which there is a substantial and legitimate public interest. Both the registration and cancellation provisions of the P.C.P. Regs. establish "unacceptable risk of harm to ... public health, plants, animals or the environment" as a basis upon which the Minister must reach a decision. Accordingly the registration process is one which engages the interest and the concern of the general public, particularly of citizens and associations interested in questions of health and environmental quality. There is also a "benefit" aspect to the "risk-benefit" analysis which is implicit in the assessment of unacceptable risk of harm. Accordingly, user groups and even consumer groups have an interest in ensuring that the decision-making process takes proper account of the benefits to be derived from the use of a particular pesticide. And of course the users of pest control products have an interest in the "health" side of the risk-benefit equation. There may also be other parties who, from time to time, will have a legitimate interest in the decision-making process. Some examples might be occupiers of land neighbouring premises where pesticides are being applied, retailers of pest control products, or suppliers of components of a pest control product. The challenge for the Minister of Agriculture, and for those affiliated with him in the decision-making process, is to take account of these various interests and points of view and yet ensure that the process is still capable of arriving at a decision.

Traditionally, there has been little explicit effort to involve parties other than the applicant/registrant in the decision-making process. A draft

study of pesticide law and policy prepared for the Law Reform Commission of Canada is critical of "a virtual lock-out of the public from participation in the decision-making process respecting registration or re-evaluation".¹²⁶ There has, until recently, been no formal provision for involvement of the public at any stage of the process prior to the establishment of a Review Board. And, when it is remembered that only two Review Boards have been established in fifteen years of operating under the present scheme of the P.C.P. Regs., it is obvious that this recourse alone does not serve to satisfy demands for greater access and input. Agriculture Canada has recognized the need to improve "consultation" and in 1983 commissioned Dr. Liora Salter to conduct a study into the consultation process.¹²⁷ The Report recommended that several steps be taken to make the process more open. These included the establishment of a pesticide "hot line" to deal with requests for information and to ensure that views expressed receive regulatory attention; the publication of "backgrounders" containing synopses of registration-related information; the establishment of a pesticide commission to hold public consultations and make recommendations on broad policy questions; and, the publication of decisions in the Canada Gazette and available through the Department to a mailing list. Some of the measures have already been implemented. A "hot line" is now operating; the Pest Management Advisory Board has been established,¹²⁸ and, the upgraded Pesticides Directorate will be responsible for the dissemination of "backgrounders" and the publication of regulatory decisions.¹²⁹

The Salter Report spells out a wide range of options for public participation and has canvassed the reactions of many interested constituencies. It is not the purpose of the present Report to re-cover that ground. Rather the present purpose is to identify any potential legal problems arising out of the

existing process of consultation. There are three "phases" of the process to be considered: the initial decision to grant, cancel or suspend registration, the proceedings before a Review Board, if one is formed, and the Minister's consideration of the recommendations and report of a Review Board.

II. B. (1) The Minister's Initial Decision

The question of the obligation owed by the Minister to conduct a hearing or to undertake some kind of procedure to disclose the case and receive submissions has been considered in Part A.2 of this Chapter. There, it was said that there is little precedent in common law jurisprudence for granting public interest groups a free-standing "right to be heard". The orientation of the common law has been to protect private interests and, if the party most directly affected is not given a "hearing", it is unlikely that a public interest group will be able to claim a right to more procedure than the party with a private interest, in this case the registrant/applicant. An example of a typical judicial reaction to claims by public interest groups that they are owed a duty of fairness and, hence some kind of a hearing can be seen in the British Columbia case of Sea Shepherd Conservation Society v. R. in Right of British Columbia and Minister of Environment.¹³⁰ In that case the petitioner Society sought a declaration that the Minister, in deciding to undertake an extensive wolf kill program, had acted in a procedurally unfair manner by denying the Society an opportunity to meet with him to discuss the program. Gibbs J. concluded that the Minister "was not exercising a judicial or quasi-judicial function and accordingly he was not under a duty of fairness towards the petitioners or anyone."¹³¹ While Gibbs J. went too far in suggesting that the Minister's decision has to be of a judicial or quasi-judicial nature to engage a duty of fairness,¹³² the underlying unwillingness to

impose a duty upon a Minister to more effectively consider the public interest is not unusual. And, lest it be thought that the explicit reference to health and the environment in the P.C.P. Regs. provides a statutory basis for distinguishing pesticide registration from wolf kill programs, the British Columbia legislation involved in the Sea Shepherd case required the Minister to "encourage and maintain an optimum quality environment" and to manage environmental resources "having regard to the economic and social benefits they may confer on the Province".¹³³

While the likelihood of an individual or a society representing the public interest successfully claiming a right to be consulted or to be heard where no other parties are consulted or heard is not great, the probability of a successful challenge becomes much higher as some procedure is in fact accorded to other parties. And of course it is this scenario which is more realistic in the context of pesticide registration. There are, for example, two instances in which the federal courts have overturned decisions of the C.R.T.C. respecting the level of participation of subscribers¹³⁴ or competitors.¹³⁵ There are also cases where parties have successfully challenged the participation rights accorded them by Royal Commissions.¹³⁶ However, there is a recent Ontario decision upholding the decision of the Commission of the Grange Inquiry to deny the parents of the deceased children permission to participate in the phase of the Inquiry dealing with the conduct of the police.¹³⁷ The criteria which seem to emerge from this latter series of cases (based, it should be noted, upon an interpretation of the statutory language of "a substantial or direct interest")¹³⁸ that the interest must be more than "academic", that there must be an interest different from that of other members of the public, such as the risk of being personally discredited, and that the case cannot be adequately presented without the participation of the

prospective parties. It must be conceded, however, that there remains a great deal of confusion as to the criteria which are really being applied to determine rights of participation. It is a frequent criticism that debates about standing to participate are often proxies for a much deeper confusion about legal decision-making.¹³⁹

What can be said about the few cases in which courts have intervened to allow participation is that: (a) the decision has been based upon a statutory text governing the issue, and (b) there has been a hearing where the would-be participants were denied an opportunity to take part. What can also be said is that there are at least as many cases where the courts have simply deferred to a decision of an administrative body not to permit participation.¹⁴⁰

Returning to the question of pre-Review Board phase of the pesticide registration process, which is effectively the whole process when account is taken of how rarely a Review Board is actually requested and constituted, there seems to be little basis for a claim by public interest representatives that there ought to be a hearing. Even if the Minister or the Pesticides Directorate does undertake to hold a hearing with the applicant/registrant, there is still little likelihood of a successful claim by public interest groups to attend and participate. It may be that a meeting which involved confronting the registrant/applicant with data or allegations submitted by public interest groups would be an occasion where participation could be successfully claimed. Essentially, then, it is only where some evidence of favouratism or partiality or arbitrariness can be demonstrated that public interest representatives are likely to be successful in claiming procedural rights in the course of the Minister's initial decision.

II. B. (2) The Review Board

At the Review Board phase, the situation is significantly different. S.25(1) of the P.C.P. Regs. says the Board shall "give the person who applied for the hearing and all other persons who may be affected by the subject matter of the hearing an opportunity to make representations". The provision does not require that a prospective participant show that he or she actually was affected, only that he or she may be affected. On the other hand, the provision is not as broad as that found in the Environmental Contaminants Act which gives any "interested or knowledgeable person a reasonable opportunity of appearing before the Board, presenting evidence and making representations to it."¹⁴¹

In the alachlor hearings the Review Board interpreted s.25 of the P.C.P. Regs. as permitting what can be called full rights of participation, including representation by counsel and reasonable cross-examination. What is particularly interesting is that the Board provided a fund of \$75,000 for public interest parties to participate. In establishing the fund, the Board stated that funding would be allocated to parties in accordance with the following criteria:

- (a) whether there is a clear ascertainable interest to be represented and a specific purpose for the assistance;
- (b) whether a separate and adequate representation of a particular interest would assist and substantially contribute to the inquiry;
- (c) whether there is a need, and whether the party has tried to raise funds through other means;
- (d) whether there is demonstrated a delineated purpose for the expenditure of funds;
- (e) whether there has been a co-ordinated effort to bring a number of interests within one representative group;
- (f) whether the particular party has established a record of concern regarding the subject matter of the inquiry and demonstrated a commitment in a responsible way to that concern;
- (g) how the party intends to account for the funds.¹⁴²

In addition the Board gave notice that it would allocate the funding on the basis

of attempting to obtain the greatest assistance in the information-gathering function. A further interesting feature of this particular funding scheme is that it provided for interim payment of fifty per cent of the approved funding, although the administration of the latter aspect was not unproblematic.¹⁴³

Whatever might be said of general claims to fair treatment for interveners or of rights to participate, there is no question that intervenor funding is a feature of the process which has not been and is highly unlikely to be imposed by common law judicial review or by constitutional notions of fundamental justice. But that is not to say that funding for parties to participate in administrative proceedings is an unusual occurrence. Direct funding is often available for participants in public inquiries and royal commissions. Intervenors have been assisted in making representations before environmental assessment review panels.¹⁴⁴ Core funding is provided for the Consumers Association of Canada and the Public Interest Advocacy Centre. The cost of participation is offset by awards of costs in hearings of the C.R.T.C.,¹⁴⁵ the Ontario Energy Board,¹⁴⁶ Joint Boards under the Ontario Consolidated Hearings Act,¹⁴⁷ the Alberta Public Utilities Board,¹⁴⁸ and the British Columbia Public Utilities Board,¹⁴⁹ to give some examples. These are all regulatory decision-makers, engaged in decisions which have significant public impact, especially in the environmental area. It is apparent that financial support, through direct funding, costs, core funding, tax incentives or by some other means is necessary to bring forward the perspective of public interest groups on issues before these decision-makers. A 1981 working paper prepared for the Economic Council of Canada recommends in favour of extended funding of public participation.¹⁵⁰ Likewise, a Law Reform Commission of Canada Study Paper recognizes that, no matter what other steps are taken to enhance participation in the regulatory process by public interest

litigants, the problem of funding will remain as the most basic impediment.¹⁵¹

Thus, while the provision of funding for public interest groups is not required by the common law, or by the P.C.P. Act or the P.C.P. Regs., it is a step which enhances public participation in the pesticide registration process. It is ironic, however, that the public is said to have been virtually locked out of this process, to lack access to basic information regarding the data in registration packages, to have been uninformed about the prioritization of registration issues, but is now funded to intervene in the public interest when a review board is finally appointed, only the second one in fifteen years. If the goal is enhanced public participation, a better and continuous flow of information¹⁵² regarding registration decisions combined with some modest core funding would in all likelihood achieve a more efficient and effective contribution than is to be gained by one-shot financing of participation in formal hearings.

The task posed in this Report is to point out potential legal difficulties in the existing regime. As far as the provision of funding is concerned, it presents no particular legal problem. So long as Agriculture Canada is satisfied that it is getting value for its money, it is, in principle, to borrow the language used by Senator Hayden back in 1969 when he was propounding an appeal or review procedure in the first place, a "wholesome thing" that the public be involved in a meaningful way. The question of whether it is a practice which ought to be repeated is better answered by those with first-hand experience in the alachlor hearings and with a more concrete sense of the fiscal implications of such funding. Returning to legal problems, there is one final point regarding the administration of direct funding, especially where it is done on an interim basis, the administration of the funding ought to be independent of the tribunal.

If the administration is not done independently, there is potential for a conflict of interest or a reasonable apprehension of bias to arise. The PMAB seems to be well placed to handle this task, both in terms of its expertise and its independence.

II. B. (3) The post-Review Board phase

After receiving the Report of the Alachlor Review Board regarding the temporary registration, the Minister dealt with all participants on equal terms. That is the only viable approach for him to have taken and, in light of the informality of the procedures adopted (i.e. writing letters to a handful of parties), there is no reason from the perspective of administrative efficiency not to do so in future cases.

Conclusion re: public participation

In light of prevailing judicial standards regarding standing or procedural fairness to publicly minded citizens or associations, it is unlikely that the Minister will get into much difficulty, under the existing scheme, in the pre-Review Board phase of the decision-making process. However, as the public is included in a more participatory role and is consulted more openly, greater care will have to be taken to "hear both sides", even in an informal way. As for the Review Board phase, the public interest groups are getting just about everything they could hope for, at least apart from any problems arising with respect to the release of information. As for the post-Review Board phase, they have been treated in the same manner as other participants at the Review Board, and that is as it should be.

The serious questions about public participation are not so much questions

of legal doctrine as they are questions of administrative policy. The two key questions seem to be whether to involve the public more in the initial decision to register and in the ongoing process of evaluation; and, whether to continue funding public interest groups and interveners in the Review Board proceedings. The first is largely a question of proprietary interest in information and the second is largely fiscal in its implications. These questions will be returned to in Chapter III.

II. C. The Advisory Function: The Procedural Obligations of Review Boards

Since the P.C.P. Regulations were promulgated in 1972, there has been provision for the appointment of Review Boards to "inquire into the subject matter of an application to the Minister for a hearing. In fact, only two Review Boards, have ever been appointed and gone through a complete review process.

A Review Board makes recommendations to the Minister who, after "considering" the report of the Board, may take such action with respect to the subject matter of the hearing "as he deems advisable". The advice of the Board need not be followed. Neither does the Board control its own substantive mandate. It is in the discretion of a registrant/applicant to "apply in writing to the Minister for a hearing setting out in the application the matters he intends to raise at the hearing". Thus the Review Board is in final control of neither its input not its output. It can be characterized as an expert audience which stands in the place of the Minister to hear the "subject matter" defined by the party requesting the hearing. Also, the Review Board is an ad hoc creation, being appointed by the Minister from the available experts as hearings are requested. Finally, the advice of one of only two Review Boards which have ever been constituted and gone through the process of holding a hearing, that being

the Alachlor Board on the question of renewing the temporary registration, was not followed by the Minister.

This picture of the Review Board in the overall process of pesticide registration and re-evaluation is one of relative insignificance, even of impotence. One might well ask what useful purpose they serve. In the most general terms, the purpose they serve is to inject into the process a "judicial" type of proceeding. Section 5(d) of the PCPA was amended during Parliamentary consideration of the legislation in 1969 to add the reference to procedures for review. This was done in the course of Committee hearings in response to concerns regarding the lack of an independent arbiter¹⁵³. Ostensibly the subsequent provision in the P.C.P. Regs. for Review Boards, giving to industry the capacity to trigger the establishment of a Board and the right to appear before it to make submissions on "the subject matter of the hearing", as defined by the applicant, responds to the concern expressed by the Committee.

Whatever may be the real contribution of the Review Boards in the overall process of pesticide registration and evaluation, it is clear from the analysis of the procedural obligations of the Minister in Part II.A. of this Report that the inclusion of a Review Board in the regulatory scheme has profoundly affected the characterization, on judicial review, of the function of the Minister and the obligations consequently imposed. Problems of information gathering and of Ministerial bias are directly affected by the existence of the Board. There is no doubt that the Minister's general obligation to be procedurally fair is more exacting because his relationship to the Board gives his function more of a "judicial" air.

In this part of the Report, the procedural obligations of the Review Board itself will be considered. How much flexibility has the Board in gathering

information or in deviating from a formal hearing model? In the Alachlor case, judicial review proceedings were commenced against the Review Board on the ground that the Board had committed errors of jurisdiction as well as errors of fairness and natural justice¹⁵⁴. The complaint with respect to procedural fairness was that the Board had acted on the basis of information which was not introduced in evidence at the public hearing. The question of official notice is a specific manifestation of a more general issue in the Review Board process: just how judicial must the Board's proceedings be?

The process actually adopted by the Alachlor Review Board was very formal, allowing for oral testimony, representation by counsel, examination and cross-examination. On the spectrum of administrative decision-makers, the process adopted by the Review Board would approach the judicial as opposed to the administrative pole. It is not surprising that such a formal style was adopted when one considers the mandate given the Board by the P.C.P. Regs. Section 23 allows the registrant/applicant to apply in writing for a hearing, setting out the matters intended to be raised at the hearing. Section 25 provides that the Board shall inquire into the subject matter of the hearing and shall give affected persons an opportunity to make representations. Section 25 also requires the Board to send to the Minister, along with its report and recommendations, "all documents and other material used at the hearing". Taken together, all of these references to a "hearing", to "representations to the Board at the hearing", and to "documents and other material that the Board used at the hearing" generate an image of a full-blown formal proceeding. In the face of these explicit references in the P.C.P. Regs. to hearings, representations, and documents used at the hearing, it is difficult to contend that anything other than a formal process can be adopted. The most important evidence of the

procedure to be followed by an administrative tribunal is the relevant legislative text. As Estey J. observed in Innisfil v. Vespra:

The procedural format adopted by the administrative tribunal must adhere to the provisions of the parent statute of the Board. The process of interpreting and applying statutory policy will be the dominant influence in the workings of such an administrative tribunal¹⁵⁵.

As far as Estey J. was concerned in Innisfil a legislative provision for a "hearing" included the right to cross-examination. According to that decision, one should expect to find "the clearest statutory curtailment of the citizen's rights to meet the case against him" before accepting that a legislative provision for a "hearing" did not include the opportunity to cross-examine. As was noted earlier, the Federal Court of Appeal adopted a different view of what was required for a "public hearing" in a CRTC proceeding to deal with cable television subscription rates. In the London Cable case it was held that cross-examination and disclosure of staff documents were not necessary to allow subscribers "to exercise their rights as members of the 'public'"¹⁵⁶.

What is required to constitute a "hearing" must be decided by a functional analysis of the interests affected and the utility of a particular procedure on a case-by-case basis. In some circumstances the obligations of audi alteram partem can be met without there being an oral hearing at all.¹⁵⁷ On the other hand, recent developments in both common law and constitutional jurisprudence have imposed requirements of oral hearings¹⁵⁸ and have even recognized a right to be represented by counsel in certain administrative proceedings. The Federal Court of Appeal has held unconstitutional a refusal by a presiding officer of a prison disciplinary board of a request by an inmate to be represented by counsel, a procedural opportunity which, in the words of the Court: "bespeaks the fullness of the adversary process"¹⁵⁹. The factors outlined as being significant in

determining whether counsel was a necessary aspect of fundamental justice are as follows:

1. the seriousness of the charge or of the potential penalty;
2. whether any points of law are likely to arise;
3. the capacity of the particular prisoner to present his own case;
4. the likelihood of procedural difficulties arising;
5. the need for reasonable speed in adjudication; and
6. the need for fairness as between prisoners and as between prisoners and prison officers.

Taking these factors and transposing them to the decision to be reached by a pesticide Review Board, it is difficult to see how representation by counsel can be avoided in the review process. The consequences of a decision are serious, first for the registrant but also for the general public and for user groups. As for the likelihood of issues of law arising, if the alachlor experience is to be taken as representative, the whole proceeding with respect to temporary registration was, from the first preliminary meeting to the three threatened actions in judicial review upon receipt of the Report, plagued with controversial points of interpretation and procedure. Indeed, the first eleven pages of the Report of the Alachlor Review Board are devoted to "Introduction and Law". If account is taken of these factors, essentially being numbers 1, 2 and 4 of those identified by the Federal Court of Appeal in Howard (supra), it seems difficult to avoid the conclusion that parties to a Review Board hearing cannot be refused the opportunity to have counsel. The other three factors either have no particular bearing on a Review Board proceeding or are neutral in their impact.

Returning to the question of cross-examination, Estey J. in Innisfil treated the matter primarily as one of statutory interpretation but he also outlined the kind of general considerations appropriate to characterizing the proceeding. In his view, it is a matter of characterizing a decision-maker either as having a mandate "to determine rights between contending parties", with the decision to be

taken upon the basis of facts and submissions introduced, or as having a mandate "more concerned with community interests at large, and with technical policy aspects of a specialized subject"¹⁶⁰. In elaboration of the latter model, Estey J. observed that where a Board is composed of persons experienced or trained in the sector of activity consigned to the administrative supervision of the Board and where the Board takes on the complexion of a department of the executive branch of government concerned with the execution of a policy laid down in broad concept by the Legislature, "the trappings and habits of the traditional courts have long ago been discarded"¹⁶¹.

A Review Board under the P.C.P. Regs. has elements of both of these decision-making models. The element which makes it most difficult to treat the Review Board as fitting the policy-making, non-Court model is that it is ad hoc. The Board is not charged with the administration of a sector of activity. So far from taking on the "complexion" of a government department, it is an ad hoc, one-time event which stands in the place of a government department, and which does so because it is charged with holding a hearing. It is more difficult to sort out the "adversarial" from the "policy-making" aspects of the Board's mandate. In the sense that it is to make recommendations, based on its assessment of the efficacy or safety of a specific pest control product, it seems to have an adjudicative function. To the extent that the Board inherits the ambiguous standards established for Ministerial decision-making, its function is more policy-oriented. To the extent that the departments of government or groups representing the public interest appear in adversarial or prosecutorial capacities, there is an adjudicative element. Finally, while the Board is composed of experts in their respective fields, they have no developed expertise or experience in the administration of the P.C.P. Act or P.C.P. Regs. On balance

the Review Boards, and the interests at stake, are decidedly judicial in character and the procedures accorded in the alachlor hearings were probably, apart from the question of funding discussed in Part II.B. of this Report, not more than would be required by basic principles of fairness.

Before concluding the discussion of the procedure to be followed by Review Boards acting under the P.C.P. Regs., there is one more issue which arose in the alachlor review. It concerns the information upon which the Review Board may rely in reaching its decision. No toxicological data were introduced by either Monsanto or the government during the four days of hearings on the renewal of temporary registration. However, the Board, after the conclusion of the hearings and in the course of its deliberations, relied in part upon information which was not introduced in evidence at the hearing. The Board developed four tables, including its own "worst case" hypothetical, assessing various aspects of the risk posed by alachlor. This was objected to by two of the public interest participants in the hearings, claiming that the Board had breached principles of fairness in not giving the parties notice that it intended to rely upon these data and in not allowing the parties an opportunity to respond.

In light of the formal characterization of the proceedings which emerges from the discussion above, the objection to the Review Board gathering its own data and creating tables has merit. The principle that evidence, particularly when it is of a critical or controversial nature, must be disclosed to parties and an opportunity given to respond is a basic element of the audi alteran partem rule. In Kane v. The Board of Governors of the University of British Columbia,¹⁶² the Supreme Court of Canada quashed a decision to discipline a faculty member because the President of the University met with the Board after a hearing at which Kane was present. In the post-hearing meeting the President

discussed the matter with the Board and gave them "the necessary facts". The Court held that the Board was under an obligation to postpone further consideration until such time as Dr. Kane might be present and hear the additional facts adduced, or at the very least the Board should make him aware of those facts and afford him a real and effective opportunity to correct or meet any adverse statements made.

Nor is the concern regarding the unfairness of extra-hearing evidence confined to the "necessary facts" in a disciplinary proceeding. An instance of "official notice" which is pertinent to the pesticide review process arose in a challenge to a Tariff Board decision on the technical question of whether particular salts were derivatives of tetracycline. Oral evidence was given before the Board that the salts were not derivatives. In its reasons the Board rejected the oral evidence, basing its decision upon the Condensed Chemical Dictionary and Stedman's Medical Dictionary. The Supreme Court of Canada considered this to be in breach of natural justice. In the words of Pigeon J.:

While the Board is authorized by statute to obtain information otherwise than under the sanction of an oath or affirmation this does not authorize it to depart from the rules of natural justice. It is clearly contrary to those rules to rely on information obtained after the hearing was completed without disclosing to the parties and giving them an opportunity to meet it¹⁶³.

Even in the case of proceedings by the Anti-Dumping Tribunal, where there is legitimate concern about trade information and where the legislation mandates that steps be taken not to make such information available for the use of any business competition or rival, the Federal Court of Appeal has held that the minimum that is required by the concept of "full disclosure and a fair hearing" is that competitors may be excluded while confidential evidence is being taken, but they must still be provided with a summary or report of that evidence and

given an opportunity to respond¹⁶⁴. Considering the force of the principle of audi alteran partem as illustrated by these cases, and particularly in light of the formal procedure which it has already been concluded a Review Board must follow, and also in light of the ad hoc role of the Board, it seems that Review Boards acting under the P.C.P. Regs. cannot be too careful about their resort to sources of information not made available to the parties. Ideally, of course, this evidence ought to be admitted in the hearing itself. However, if for some reason evidence not introduced at the hearing becomes available and the Board intends to rely upon it, the parties must be given some reasonable opportunity to consider the material and to respond.

Some might argue that the Review Board ought to be subjected to a lesser standard of scrutiny as regards ex parte contacts or official notice because it performs a recommendatory as opposed to an adjudicative function. That is to say that the fact that it only gives advice and does not make final decisions ought to be relevant to determining its procedural objectives. However the older jurisprudence regarding the status of investigatory or recommendatory decision-makers¹⁶⁵ has been largely set aside with the development of a more flexible standard of procedural fairness. In a recent decision the Federal Court of Appeal confirmed that the National Farm Products Marketing Council owes a duty of procedural fairness even though its function is to make policy recommendations to the Minister of Agriculture¹⁶⁶. Moreover, the case involved a challenge because of the submission to the Council following its hearings of a cost-of-production study which had been mentioned but not introduced during the formal hearings of Council. The Report to the Minister was quashed; the hearings were ordered reopened; the calling of any necessary witnesses and the permission of cross-examination were ordered; and, the Council was ordered to permit the introduction

of rebuttal evidence by any party. Considering that the Review Boards under the P.C.P. Regs. exercise a function which is clearly less policy-oriented than that of the Farm Products Marketing Council, any lingering doubt as to how formal proceedings ought to be for Review Board hearings can be set aside.

Thus, the Review Boards, as presently constituted, must adhere to a very formal model of procedural justice. There seems to be little way to avoid this so long as the Board remains a special case, ad hoc audience to stand in the place of the Minister and make recommendations.

ENDNOTES, CHAPTER II

1. Re Multi-Mills Inc. and Minister of Transportation and Communications (1977) 73 D.L.R.(3d) 18 (Ont. C.A.); Padfield v. Minister of Agriculture, [1968] A.C. 997 (H.L.)
2. Roncarelli v. Duplessis [1959] S.C.R. 121; Gershman v. Manitoba Vegetable Producers' Marketing Board (1976), 69 D.L.R. 114 (Man C.A.)
3. Calgary Power Ltd. v. Copithorne, [1959] S.C.R. 24, at 33, per Martland J.
4. In Calgary Power, ibid, it was thought significant that no appeal was provided.
5. C.R.T.C. v. C.T.V., [1982] 1 S.C.R. 530, at 546, per Laskin C.J.C. (emphasis added).
6. See Re Watt and Register of Motor Vehicles (1957), 13 D.L.R. (2d) 124 (Man. Q.B.); Crabbe v. Minister of Transport [1972] 2 F.C. 863 (C.A.); Confederation Broadcasting (Ottawa) Ltd. C.R.T.C., [1971] S.C.R. 906.
7. Cardinal and Oswald v. Director of Kent Institution, [1985] 2 S.C.R. 643, at 653, per Ledain J. See also: Nicholson v. Haldimand - Norfolk Regional Board of Commissioners of Police [1979] 1 S.C.R. 311; Martineau v. Matsqui Institution Disciplinary Board (No. 2), [1980] 1 S.C.R. 602; and, Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735.
8. Martineau v. Matsqui, ibid, at 629, per Dickson J.
9. Cardinal, supra, note 7
10. Inuit Tapirisat, supra, note 7, at 754
11. Ibid, at 753
12. P.C.P. Regs., s.25
13. Monsanto Inc. v. Minister of Agriculture, April 8, 1986 Unreported decision, Federal Court, Trial Division.
14. Township of Southwest Oxford v. Attorney General of Ontario (1983), 44 O.R.(2d) 376 (H. Ct.J.); Wilson v. Minister of Justice (1985), 13 Admin. L.R. 1 (Fed. C.A.); Re Mac's Convenience Stores Inc. and Minister of the Environment for Ontario (1984), 48 O.R. (2d) 9 (Div. Ct.); Re Hardy et al. and Minister of Education (1985), 22 D.L.R. (4th) 394 (B.C.S.C.) (Minister breaching duty of fairness is not giving parents sufficient warning of decision to close school); Re Apotex Inc. and Attorney-General for Ontario (1984), 47 O.R. (2d) 176 (H.Ct.) (refusal of submission regarding inclusion of pharmaceutical product in drug benefit formulary subject to judicial review).

15. Supra, note 7, at 748. See also Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441.
16. Jollimore v. Attorney-General (unreported decision of Hallett J., N.S.S.C., T.D. dated July 15, 1986, with supplementary reasons dated July 21, 1986).
17. Singh et al v. Minister of Employment and Immigration [1985] 1 S.C.R. 177.
18. MacBain v. Canadian Human Rights Commission (1985), 62 N.R. 117, at 129-130, per Heald J.
19. See Hogg, Constitutional Law of Canada (2d ed., 1985), at 640-42; and Hogg, "A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights" in Tarnopolsky and Beaudoin (eds.) Canadian Charter of Rights and Freedoms: Commentary (1982), at 17.
20. Singh v. M.E.I., supra, note 16, at 227.
21. Most of the post-Singh Bill of Rights jurisprudence has involved immigration issues: Tonato v. M.E.I. [1985] 1 F.C. 925 (T.D.); Brar v. M.E.I. [1985] 1 F.C. 914 (C.A.). The principal decision outside of the immigration context is MacBain, supra, note 17, where the Federal Court of Appeal seemed not to be troubled by the "rights or obligations" issue.
22. To be discussed in II.B.(ii), infra. The Supreme Court of Canada employed the rights-privilege distinction to justify a narrow interpretation of section 2(e) of the Bill of Rights in Mitchell v. The Queen, [1926] 2 S.C.R. 570. In Singh supra, Wilson J., while not expressly overruling this approach, characterized it as a "restrictive attitude: and stated: "I do not think this kind of analysis is acceptable in relation to the Charter." (at 209).
23. See Hogg, Constitutional Law of Canada (2d ed., 1985) at 745-46.
24. See: T. Christian, "Section 7 of the Charter" (1984), 22 Alta. L.R. 222.
25. The Queen (N.B.) v. Fisherman's Wharf (1982), 135 D.L.R. (3d) 307, at 315 (N.B.Q.B.); aff'd (without reference to Charter) 144 D.L.R. (3d) 21 (N.B.C.A.). See critical comments in Whyte "Fundamental Justice" (1983), 13 Man. L.J. 455 and Brandt, Comment (1983) 61 Can. Bar. Rev. 398.
26. Re D & H Holdings Ltd. and City of Vancouver (1985), 21 D.L.R. (4th) 230 (B.C.S.C.).
27. Re Mia and Medical Services Commission (1985), 17 D.L.R. (4th) 384, at 412 (B.C.S.C.). This view of "liberty" was also accepted in Isabey v. Manitoba Health Services Commission [1985] 6 W.W.R. 712 (Man. Q.B.). In Charboneau v. College of Physicians and Surgeons of Ontario (1985) 52 O.R. (2d) 552 (H.Ct.), the argument that liberty included the right to earn a living was rejected.
28. In Singh, supra, note 16, Wilson J. did not find it necessary to articulate

a definition of "life, liberty and security of the person" since, in her view, the freedom from the threat of physical punishment must be included in the concept of "security of the person".

29. Pursuant to s. 13, Consolidated Hearings Act, S.O. 1971, c. 20.
30. Manicom et al. v. Corporation of the County of Oxford et al. (1985), 34 C.C.L.T. 148, at 158. Another action, based upon a claimed violation of common law obligations of fairness, was allowed to continue when a motion to strike was refused: Township of South-West Oxford v. Attorney-General for Ontario (1983), 44 O.R. (2d) 376 (H.Ct.J.).
31. Ibid., at 169-70. This case has been appealed to the Ontario Court of Appeal.
32. Operation Dismantle v. The Queen [1985] 1 S.C.R. 441.
33. Ibid., at 473.
34. P.C.P. Act, s. 5(d).
35. The amendment actually emerged from the Senate Standing Committee on Banking, Trade and Commerce. See Proceedings, First Session - Twenty-eighth Parliament, No. 30 (March 20, 1969) and No. 37 (April 30, 1969). The amendment was made by the Senate after the Bill had received third reading in the House of Commons. A first amendment adopted by the Senate to incorporate mutatis mutandis the appeal procedures of the Hazardous Products Act was the subject of a message from the House of Commons (Debates, 1968-69, April 2, 1969, pp. 7443-4) on the grounds that it would be difficult to foresee all of the ramifications of the proposed appeal procedure. In a subsequent meeting between the Minister of Agriculture, Hon. H.A. Olson and the Senate Committee, the present version of section 5(d) was agreed upon. (Senate Standing Committee on Banking, Trade and Commerce, Proceedings, No. 37, April 30, 1969.) The amendment was subsequently adopted by the House (see Debates, 1968-69, May 14, 1969, pp. 8703-7).
36. P.C.P. Regulations, s. 21.
37. Ibid.
38. Ibid., s. 23.
39. Ibid., s. 24.
40. Ibid., s. 25(1).
41. Ibid., s. 25(2).
42. See: Alachlor Review Board, Guide for Parties, (undated) (issued December, 1985).
43. See these factors spelled out by Dickson J. in Minister of National Revenue

v. Coopers and Lybrand, [1979] 1 S.C.R. 495, at 500, an instance in which Canadian federal courts must continue to engage in the classification of functions because it is imposed by section 28 of the Federal Court Act.

44. [1978] 1 W.L.R. 1520 (Ch.D.).
45. Notwithstanding the analysis of the Supreme Court in C.R.T.C. v. C.T.V., supra, note 5.
46. See cases referred to at note 6, supra.
47. FAI Insurance v. Winneke (1982), 41 Aust. L.R. 1 (H.Ct.) per Mason J.
48. Ibid., at 3.
49. Canadian Horticultural Council, Report of the Pesticides Review Committee to the 62nd Annual Meeting, March 4-7, 1984.
50. Senate Standing Committee on Banking, Trade and Commerce, Proceedings, 1968-69.
51. Monsanto v. Minister of Agriculture, (F.Ct.T.D., unreported decision, dated January 23, 1986).
52. Monsanto v. Minister of Agriculture, (F.Ct.T.D., unreported decision, dated April 8, 1986).
53. E.g. Saskatchewan Telecommunications v. C.R.T.C. [1980] 1 F.C. 505 (T.D.); In Re C.R.T.C. and Re London Cable T.V. [1976] 2 F.C. 621 (C.A.).
54. Scott v. Rent Review Commission (1977), 23 N.S.R. (2d) 504 (S.C.A.D.); Friends of the Public Gardens v. Halifax et al. (1984), 65 N.S.R. (2d) 297 (S.C., T.D.); Canadian Tobacco Manufacturers Council et al. v. Attorney General of Canada (1986), 65 N.R. 392 (Fed.C.A.).
55. P.C.P. Regulations, ss. 18(d)(ii), 19
56. Cf. Re Hardy et al. and Minister of Education (1985), 22 D.L.R. (4th) 394 (B.C.S.C.) where there was a requirement in the Regulations that on decisions with respect to school closings, the Board was required to show to the satisfaction of the Minister "that the residents of the area in which the school is located have been made aware of the need [to close the school]."
57. P.C.P. Regs., s. 25.
58. Supra, note 14.
59. Supra, note 15.
60. At thealachlor hearings on the temporary registration, Dr. T. Daynard, General Manager of the Ontario Corn Producers' Association, appeared in

person for one day only.

61. See cases cited at note 53, supra.
62. See: S.W. Ormrod, "Registration of Pesticides in Canada under the Pest Control Products Act". Speech to the International Symposium on Health and Safety in Agriculture, Saskatoon, October 9, 1985; Pesticides Workshop Proceedings, Canadian Council of Resource and Environment Ministries, Toronto, March 8-11, 1982.
63. MNR v. Coopers and Lybrand [1979] 1 S.C.R. 495, at 504, per Dickson J.
64. Ibid., at 505.
65. Simlote v. Council of the Association of Professional Engineers, Geologists and Geophysicists of Alberta (1983), 26 Alta. L.R. (2d) 14 (Q.B.), at 20.
66. T.E. Quinn Truck Lines v. Snow, [1981] 2 S.C.R. 657, at 665.
67. Ibid., at 667.
68. Pest Control Product Regulations, s. 13(1).
69. Unreported judgment, April 8, 1986, p. 18.
70. [1979] 1 S.C.R. 311, at 324.
71. Ibid., at 328.
72. Cardinal and Oswald v. Director of Kent Institution, [1985] 2 S.C.R. 643, at 660, per Ledain J.
73. Ibid., at 659.
74. Supra, note 65, at 666-7.
75. Supra, note 16, at 218-19.
76. Ibid., at 213.
77. Ibid.
78. Ibid., at 229.
79. MacDonald v. The National Parole Board, Fed. Ct. T.D., unreported decision of Muldoon J., March 17, 1986, at 16.
80. Ibid., at 18.
81. Mitchell v. The Queen [1976] 2 S.C.R. 570, at 577, per Laskin C.J.C. (dissenting). For post-Charter adoption of the reasoning of Laskin C.J. in Mitchell, see: Re Swan and the Queen (1983), 7 C.C.C. (3d) 130 (B.C.S.C.);

- Re Cadeddu and the Queen (1982), 4 C.C.C. (3d) 97 (Ont. H.C.); Re Lowe and the Queen (1983), 5 C.C.C. (3d) 535 (B.C.S.C.); Re Dumoulin and the Queen (1984), 6 C.C.C. (3d) 190 (Ont. H.C.).
82. Re County of Strathcona No. 20 et al. and MacLab Enterprises Ltd. (1971), 20 D.L.R. (3d) 200, at 204 (Alta. C.A.).
 83. Township of Innisfil v. Township of Vespra, [1981] 2 S.C.R. 145, at 167, per Estey J.
 84. In Re C.R.T.C. and In Re London Cable T.V., [1976] 2 F.C. 621 (C.A.).
 85. Re W.D. Latimer Co. Ltd. et al. and Bray et al. (1974), 52 D.L.R. (3d) 161, at 169 (Ont. C.A.).
 86. Re Iwasyk et al. and The Saskatchewan Human Rights Commission (1978), 87 D.L.R. (3d) 289 (Sask. C.A.). See also the dissenting judgment of Freedman C.J.M. in McGavin Toastmaster Ltd. v. Powlowski et al., [1973] 5 W.W.R. 388 (Man. C.A.); and, Law Society of Upper Canada v. French, [1977] 2 S.C.R. 767.
 87. MacBain v. Canadian Human Rights Commission (1985), 62 N.R. 117 (F.C.A.).
 88. Ibid., at 125.
 89. E.g. Re Abel and Penetanguishene Mental Health Centre (1979), 97 D.L.R. (3d) 304 (Ont. Div. Ct.).
 90. An Act to Amend the Canadian Human Rights Act, S.C. 1985, c.26, s. 71.
 91. Ibid., s. 69.
 92. The origins of the rule nemo iude in causa sua in common law judicial review go back to Dr. Bondham's Case (1610) 8 Co. Rep. 113b, 77 E.R. 646.
 93. Supra, note 85.
 94. Ibid., at 772.
 95. Thomas v. Mount Saint Vincent University (N.S.S.C., T.D., unreported decision of Rogers J., June 9, 1986, at p. 24.
 96. Ibid., at 25.
 97. [1978] 1 S.C.R. 369.
 98. Monsanto Canada Inc. v. Minister of Agriculture, Federal Court, Trial Div., unreported, April 8, 1986, at p. 18.
 99. Supra, note 7.
 100. Ibid.

101. Inuit Tapirisat, *supra*, note 7, at 753.
102. Friends of the Public Gardens v. Halifax et al. (1984), 65 N.S.R. (2d) 297 (S.C., T.D.); Denton v. Auckland City, [1969] N.Z.L.R. 256 (S.C.).
103. Sarco Canada Ltd. v. Anti-Dumping Tribunal (1978), 22 N.R. 225 (F.C.A.); Magnasonic Canada Ltd. v. Anti-Dumping Tribunal, [1972] F.C. 1239 (C.A.).
104. Cadieux v. Director of Mountain Institution (1984) 9 Admin. L.R. 50 (F.C.T.D.).
105. Egglestone et al. v. Advisory Review Board (1983), 2 Admin. L.R. 180 (Ont. Div. Ct.); Re Napoli and Workers' Compensation Board (1981), 126 D.L.R. (3d) 179 (B.C.C.A.).
106. Township of Innisfil v. Township of Vespra (1978), 95 D.L.R. (3d) 298 (Ont. C.A.), *aff'g* (1977), 7 O.M.B.R. 233 (Ont. Div. Ct.); Kalair v. Minister of Employment and Immigration (1984), 10 Admin. L.R. 107 (F.C.A.).
107. Permaul v. Minister of Employment and Immigration (1983), 53 N.R. 323 (Fed. C.A.); see also Muliadi v. Minister of Employment and Immigration (1986), 66 N.R. 8 (Fed. C.A.).
108. Pfizer Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise, [1977] 1 S.C.R. 456, at 463.
109. Trans Quebec and Maritimes Pipeline Inc. v. National Energy Board (1984), 8 Admin. L.R. 177 (Fed. C.A.).
110. Toshiba Corporation et al. v. Anti-Dumping Tribunal et al. (1984), 8 Admin. L.R. 173 (Fed. C.A.).
111. H.N. Janisch, in a Case Comment, says these two decisions "fall far short of fully addressing one of the most urgent issues in contemporary administrative law." (1984), 8 Admin. L.R. 188.
112. MacDonald v. The Queen, [1979] 2 S.C.R. 665; Re Stoangi and Law Society of Upper Canada (1979, 25 O.R. (2d) 257 (Div. Ct.); Flick, *Administrative Adjudication and the Duty to Give Reasons*, [1978] Public Law 16; Akehurst, *Statement of Reasons for Judicial and Administrative Decisions* (1970), 33 Mod. L.R. 154.
113. E.g. Yarmouth Housing Ltd. v. Rent Review Commission (1982), 54 N.S.R. (2d) (S.C.A.D.), R.D.R. Construction Ltd. v. Rent Review Commission (1982), 55 N.S.R. (2d) 71 (S.C.A.D.).
114. Statutory Powers Procedure Act, R.S.O. 1980, c. 484, s. 17.
115. Administrative Procedures Act, R.S.A. 1980, c. 2, s. 8.
116. Manitoba Law Reform Commission, Report on Administrative Law Part I: Procedures of Provincial Government Agencies (1984) (The Manitoba Report

specifically recommends that findings and reasons be furnished, if requested, when dealing with licensing matters.)

117. Law Reform Commission of Canada, Report No. 26, Independent Administrative Agencies (1985).
118. Ibid., at 63.
119. Northwestern Utilities v. Edmonton [1979] 1 S.C.R. 684, at 706.
120. Barry E. Smith, "Practice and Procedures Before the Environmental Assessment Board" (1982), 3 Adv. Q. 195, at 207. See also: M.I. Jeffery, "Procedural Safeguards in the Context of Ontario Municipal Board and Environmental Assessment Board Hearings (1984), 5 Adv. Q. 23, at 47.
121. Salter and Leiss, Consultation in the Assessment and Registration of Pesticides, Final Report and Recommendations (1985), at 45.
122. For the recognition of just such a requirement, see R.D.R. Construction, supra, note 113. In Re Emerson and Law Society of Upper Canada (1983), 5 D.L.R. (4th) 294 (Ont. Div. Ct.) the duty to give reasons is referred to as "a fundamental rule of natural justice". (at 326)
123. D & H Holdings Ltd. v. City of Vancouver (1985), 15 Admin. L.R. 209 (B.C.S.C.).
124. Northwestern Utilities v. Edmonton, supra, note 117, at 706.
125. Supra, note 121.
126. Castrilli and Vigod, Pesticides: An Examination of Canadian Law and Policy, Draft only, 1983, at para. 440.
127. Consultation in the Assessment and Registration of Pesticides, Final Report and Recommendations (1985).
128. The Role of the Pest Management Advisory Board, A Working Paper (1986).
129. See Trade Memorandum, T-1-251, July 26, 1985, Agriculture Canada "Pesticides".
130. (1984), 55 B.C.L.R. 260 (S.C.).
131. Ibid., at 265.
132. See Andrew J. Roman, Annotation (1984), 11 Admin. L.R. 191-95.
133. Ministry of Environment Act, S.B.C., c. 30, s. 4.
134. Re C.R.T.C. and London Cable T.V., [1976] 2 F.C. 621 (C.A.).

135. Saskatchewan Telecommunications v. C.R.T.C., [1980] 1 F.C. 505 (T.D.).
136. Re Royal Commission on the Northern Environment (1983), 144 D.L.R. (3d) 416 (Ont. Div. Ct.); Re Public Inquiries Act and Shulman, [1967] 2 O.R. 375 (H. Ct.); Re Royal Commission on Conduct of Waste Management Inc. et al. (1977), 17 O.R. (2d) 207.
137. Parents of Babies Gosselin, etc. v. Grange (1984), 8 Admin. L.R. 250 (Ont. Div. Ct.).
138. Public Inquiries Act, R.S.O. 1980, c. 411, s. 5(1).
139. See: Roman, Annotation to Parents of Babies Gosselin, etc. v. Grange, supra, note 135, at 255; Chester, "Holy Joe and the Most Vexed Question - Standing to Sue and the Supreme Court of Canada" (1983), 5 Sup. Ct. L. Rev. 289. For a recent decision by an administrative tribunal not to allow requested interventions and for a comment, see: Torstar Corp. and Southam, Re: (1985), 17 Admin. L.R. 303 (O.S.C.).
140. E.g. Re Advocate Mines Limited and the Baie Verte Mines Inc. (1984), 48 Nfld. and P.E.I.R. 96 (Nfld. S.C., T.D.); Demont v. Liquor License Board (N.S.) (1985), 70 N.S.R. (2d) 78 (S.C., T.D.)
141. S.C. 1974, c. 72, s. 6(2)(i).
142. Alachlor Review Board, Guide to Parties, (December 1985), at p. 6.
143. At one point the public interest groups indicated they would not be able to continue to participate in the proceedings since a four-month delay had occurred in advancing funds to them. Arrangements were made in mid-April for the distribution of the funds. "Groups to get financing for alachlor study" Globe and Mail, April 18, 1986.
144. An internal study by the Privy Council Office entitled "Study of Assistance to Interveners Before Government Decision-making and Advisory Bodies", dated February 13, 1984, canvasses the policy and administrative issues in intervenor funding and reviews some of the existing practices, although it admits that comprehensive data on such funding is not available due to the absence of a general policy.
145. National Transportation Act, R.S.C. 1970, c. N-17, s. 73. See an interpretation of the C.R.T.C.'s powers to award costs in Bell Canada v. C.R.T.C. (1986), 17 Admin. L.R. 205 (S.C.C.).
146. Ontario Energy Board Act, R.S.O. 1980, c. 332, s. 28. For a recent interpretation denying the power to award interim costs, see: Re Ontario Energy Board (1985), 51 O.R. (2d) 333 (Div. Ct.).
147. S.O. 1981, c. 20, s. 7. See: Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee Inc. et al. (1985), 51 O.R. (2d) 23 (Div. Ct.).

148. Public Utilities Board Act, R.S.A. 1970, c. R-2, s. 2(1).
149. Utilities Commission Act, S.B.C. 1980, c. 60, s. 133(1), since amended by Miscellaneous Statutes Amendment Act (No. 1) (Bill 21, 1984) as a result of the decision in Alkali Lake Indian Band v. Westcoast Transmission Co. Ltd. (1984), 7 Admin. L.R. 64 (B.C.C.A.).
150. Engelhart and Trebilcock, Public Participation in the Regulatory Process: The Issue of Funding, Working Paper No. 17, (1981).
151. Fox, Public Participation in the Administrative Process (1979).
152. As was noted in the Introduction, this Report will not consider the problem of trade secrets and proprietary information, which is the subject of a separate study being prepared for the Pest Management Advisory Board.
153. See Chapter III, infra, at notes 7-9 and accompanying text.
154. Van Engelan et al. v. Minister of Agriculture, Federal Court File No. T-512-86. The action was withdrawn March 27, 1986, the day after the decision of the Minister to not renew the temporary registration for alachlor.
155. Supra, note 83, at 167-68.
156. Supra, note 134, at 625.
157. Eg. Hoffman-LacRoche Ltd. v. Delmar Chemicals Ltd., [1965] S.C.R. 575; R. v. Quebec Labour Relations Board, Ex p. Komo Construction Inc. (1967), 1 D.L.R. (3d) 125 (S.C.C.).
158. Supra, notes 81 to 84.
159. Howard v. Presiding Officer of the Inmate Disciplinary Court of Stony Mountain Institution (1985), 57 N.R. 280, at 304. See also Joplin v. Chief Constable of Vancouver Police Department, [1983] 2 W.W.R. 52 (B.C.S.C.).
160. Supra, note 83, at 168.
161. Ibid.
162. [1980] 1 S.C.R. 1105.
163. Pfizer Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise, [1977] 1 S.C.R. 456, at 463.
164. Sarco Canada Ltd. v. Anti-Dumping Tribunal (1978), 22 N.R. 225 (Fed. C.A.); Magnasonic Canada Ltd. v. Anti-Dumping Tribunal, [1972] F.C. 1239 (C.A.).
165. Guay v. Lafleur, [1965] S.C.R. 12.
166. Canadian Tobacco Manufacturers' Council et al. v. Attorney General of Canada (1986), 65 N.R. 392.

CHAPTER III. OUTSTANDING ISSUES AND POSSIBILITIES FOR REFORM

The P.C.P. Act and the P.C.P. Regs., the legislative and regulatory bases for regulating the registration of pesticides in Canada, are so inadequate for the task that they are almost irrelevant. The statute is skeletal. The regulations are marked by ambiguity, inconsistencies and a general failure to provide necessary standards to guide administrative decision-making. It is nothing short of amazing that the responsible officials in Agriculture Canada have been able to administer the regime for fifteen years, making thousands of decisions involving very important commercial and public interests, developing standards which the industry considers to be among the toughest in the world, without being challenged in court until the latest round of decisions with respect to alachlor. If nothing else emerges from this Report, it must be recognized that the whole scheme has been held together by the diplomacy and administrative skill of a small number of officials in what is now the Pesticides Directorate of Agriculture Canada. Through cooperation with the pesticide industry and strong communication with other government departments, federal and provincial, decisions have been made on an incremental basis, unhampered by legal challenges.

It is unlikely that pesticide registration will continue in this undisturbed mode. The industry has now learned that it can shoot holes in the P.C.P. Regs. and the adopted procedures. The public is becoming more involved in the process and will no doubt push for more expeditious and restrictive action by Agriculture Canada. As public interest representatives become more involved in the process, they will press for more frequent cancellations and suspensions of registrations, rather than the incremental reduction of use of controversial pest control

products which has characterized the administration of the scheme until the present time. Furthermore, the courts are imposing more and more procedural requirements upon administrative decision-making generally, and upon Ministerial decision-making in particular. As the experience of litigating important public issues arising under the Charter of Rights becomes more widespread, the courts are developing even higher expectations for and less deference to administrative decision-making. Finally Parliament has recently expressed an intention to exercise greater control over regulations and regulatory decision-making.

So how is the present regime of the P.C.P. Act, the P.C.P. Regs., and their administration likely to fare as it is subjected to increasing public and legal scrutiny? The answer is: "not very well". At least that is true with respect to the P.C.P. Regs. themselves and the awkward decision-making scheme which they establish for Review Boards and subsequent "re-consideration" by the Minister. The potential problems will be outlined in two parts: first, those arising from the legislative or regulatory texts; and, second, those arising from procedures adopted thereunder.

III. A. Problems in the P.C.P. Act and the P.C.P. Regs.

There are a number of problems in the legislation and the regulations which are in need of attention. The major problem with the P.C.P. Act is that it is vacuous. It sets no standards. It has no vision for the scheme of registration. The Governor in Council is given a virtual carte blanche in s.5(d) to go off and create a registration scheme. In order to restore some more appropriate balance between the legislation and the regulations, a complete new piece of legislation would be needed. While it seems more than a bit of optimistic, given the competition for time on the legislative agenda, the P.C.P. Act is an ideal

candidate for a comprehensive overhaul within a current "reform initiative" in the area of toxic and commercial chemicals.¹ However, proposals for comprehensive reform of the P.C.P. Act are beyond the reach of this paper and, speaking realistically, are unlikely to be achieved during the mandate of the present government. Short of completely revising the P.C.P. Act, it is probably advisable to pass on to the P.C.P. Regs. At least the P.C.P. Act will not pose any serious constraint on the kind of reform which can be undertaken through the Regulations.

Focusing upon ss.17 to 25 of the P.C.P. Regs., this Report has identified the following problems which ought to be dealt with through early amendments to the Regulations:

- (i) Since the decision of Cullen J. in Monsanto, temporary registration is entitled to the same process on refusal as is any decision with respect to full registration. The P.C.P. Regs. should be amended to clarify the status of a temporary registration;
- (ii) The standards of ss.18, 19 and 20 of the P.C.P. Regs. should be made consistent;
- (iii) S.24 should be amended to give to the Minister, or to some outside authority, the power to draft the terms of reference. At least the mandate of the Boards should be clarified;
- (iv) The purpose of temporary registration in s.17 ought to be clarified.

III. B. Problems of Procedure

To go beyond the language of the P.C.P. Act and the P.C.P. Regs., the most consequential problems with the existing scheme for pesticide registration are procedural. The awkward relationship between the initial decision of the Minister and the "review" established by s.23-25 of the P.C.P. Regs. gives rise

to a number of obvious and potential legal problems. These are:

- (i) At the post-Review Board phase, the Minister is vulnerable to procedural challenge, particularly with respect to contacts made in the course of his decision. It has already been seen that contacts outside the Department are problematic; it may even be that intra-departmental contacts will be questioned. The level of scrutiny is clearly heightened due to the fact that the Minister's decision follows upon a Review Board proceeding which is a full formal hearing;²
- (ii) In the post-Review Board phase, the Minister is open to challenge on the ground of bias, or prejudice. The resolution of this issue will depend on how the function of the Review Board is characterized, and, in particular, upon the characterization of the relationship between the Minister and the Review Board;³
- (iii) In the Review Board phase itself, there is almost certainly a problem with the manner in which the Board is appointed;⁴
- (iv) In the pre-Review Board phase, the Minister is under an obligation to give all parties, including the registrant/applicant, user groups, public interest representatives and any others who may have an interest from time to time in registration decisions, a "hearing" in accordance with either procedural fairness or fundamental justice. In its most general terms, this consists of disclosing to parties any information which the Minister possesses which is relevant to the parties' legitimate participation in the process. This is particularly sensitive in the case of the registrant/applicant which must be informed of "the case against it". In the case of public interest groups and other parties, it is not so easy to say what must be done. However, this much can be said: either systematic exclusion or simple failure to act will almost certainly lead to the imposition of more formal procedures through judicial review.⁵

III. C. The Easy Solution

There is one simple solution to problems (i), (ii) and (iii) above: abolish the Review Board. If there were no Review Board there would be no problem of

bias, either of the Minister or of the Board, and there would not be the problem of ex parte contacts by the Minister when considering the Board's recommendations. In practical terms, abolishing the Review Board would have almost negligible effect upon the process of pesticide registration. There have been two Review Boards in fifteen years, hardly consequential in the overall context of several thousand decisions.

III. C. (1) Possible Doctrinal Problems

But what would be the cost of abolishing the Review Boards? To answer the question first in doctrinal terms, in terms of the likely issues of judicial review which would arise, the most simple response is to say that the abolition of Review Boards would bring to the forefront the latent procedural problems suggested in (iv) above. That is to say, so long as there is provision for Review Boards, attention is deflected from the procedural obligations of the Minister and the Department in the course of the initial decision. The applicant/registrant, or any other interested party, can be told: "Why should you be worried about the procedure accorded you by the Minister? You can have your say before the Review Board." Parties concerned about interim decisions, requests for more data, or conditions added to registrations, can be told "You have no business complaining at this stage. The Regulations provide for a hearing in cases of refusal, cancellation or suspension of registration. Can you not see that it is 'the will of Parliament' that you are not to have any other procedures?" This latter point has its limitations however. First, the principle of inclusio unius, exclusio alterius is probably not as persuasive as it once was in the elaboration of standards of procedural fairness,⁶ and, in any event, it is likely to be less so where the source of the procedural provision is

a regulation adopted under the vaguest of statutory mandates. Second, all of these questions are now capable of being raised in a constitutional guise; hence, the argument of implied statutory authority is not likely to do any more than turn the debate into a constitutional one, and it has been seen earlier in this paper that, either under the Canadian Bill of Rights or the Canadian Charter of Rights and Freedoms, the registrant/applicant, user industry groups and public interest groups all have serious bases for the advancement of constitutional claims. At the end of the day however, the value of the Review Board, even if rarely resorted to, as a feature of the scheme which relieves the Minister of inevitable pressure to do something to allow interested parties an opportunity to be heard ought not to be underestimated. So long as something is seen to be done, the Minister is much less likely to have further procedures imposed by way of common law or constitutional principle than if there is no provision for a "hearing" at all.

Even if the arguments about an opportunity to be heard were more evenly balanced in the abstract, the Minister cannot escape the fact that the scheme has always included Review Boards. After fifteen years of operation with a provision for a Review Board, even though only two Boards have ever actually been constituted, people will say, with some justification: "What are you going to put in their place?" There will still be a provision in the constituting legislation giving the Governor in Council power to make regulations respecting "the procedures to be followed for the review of cases involving the refusal, suspension or cancellation of the registration" of a pest control product. In law, perhaps less precisely than in physics, there is an expectation that for every action there will be some corresponding reaction. If the Review Boards are abolished and nothing is done to compensate, then the Minister risks finding that

the "reactions" will be imposed through judicial review. As was emphasized earlier in this Report, there are important interests at stake in pesticide registration and these are interests, at least the private ones, to which reviewing courts are responsive. Taken particularly against the backdrop of the two Monsanto decisions, which fail to recognize the elaborate and, until now, successful administrative scheme which Agriculture Canada has devised for the making of decisions with respect to pesticide registration, any Federal Court judge is highly unlikely to be deferential to the administration if faced with a challenge to a Ministerial decision. In short, if the Review Board is abolished and nothing else changes, the Minister runs the risk of having an increasingly judicial procedure imposed on day-to-day decisions.

III. C. (2) Adherence to the initial purpose of s. 5(d)

At this point, it seems appropriate to ask the question: "Why a Review Board in the first place?" There are two possible motivations for wanting a Review Board: the interest of the registrant/applicant in ensuring that the Minister's decision is not either arbitrary or technically unsound; and, the interest of the public in participating and in ensuring that they have confidence in the making of decisions involving important issues of public concern, relating particularly to human health and the environment.

It is clearly the former aspect, that being the interest of the registrant/applicant, which prompted the amendment to s.5(d) of the P.C.P. Act in 1969. In the Senate Committee, which finally forced the amendment, reference was made to "an important decision", and "whether you are going to be in business or not", and the need for a "procedure by way of appeal or review".⁷ It is noteworthy, however, that the Committee discussions (which hardly can be said to

be a full canvass of the issues) did not presume that the review would be external to the Department. Witness the following exchange in the Committee:

Senator Carter: Mr. Chairman, I do not think that we should be swayed by the argument that we should not have this kind of review board because the same people would be doing the review, or because there are not enough personnel to go round. You can apply that argument to almost anything to negate it.

Senator Walker: Mr. Chairman, there is no principle at stake here. This is a technical review of a product. Now, the result is going to be the same, is it not, no matter how many times it is reviewed?

The Chairman: I do not know.

Senator Walker: Well, I will ask the deputy minister. This is purely a technical review, is it not, as to the substance of the product, and there is no principle at stake here? It is just purely chemical analysis.

Mr. Williams: It is a technical review from two standpoints: safety and efficacy. Probably the more difficult one is the efficacy question, because I think you will appreciate that we do not register products unless they have proven to our satisfaction that they are efficacious for the purpose or purposes claimed. I am talking about pest control products only now. This being the case, I think you will all appreciate that this is a highly technical matter, because circumstances vary greatly across this country, and this is why I said that sometimes we supplement the information by actual investigation of work of our own carried on our experimental farm system.

Senator Walker: If you did review it, there would be nothing more disclosed than was disclosed in your original investigation, would there?

The Chairman: Senator Walker, how can this witness say, without knowing who the personnel of the board may be or what the problems are?

Senator Walker: But I understand that the people doing the review would be practically the same people who did the original work and they would be experts.

Senator Flynn: I understand that, but I suggest that neither the minister nor the deputy minister has raised any objection to the principle involved in the amendment. They said it is difficult and cumbersome, but the principle is valid.

Certainly it will be difficult in the beginning to operate this system, but that is another thing. I think in the end we should be able to find a solution. I think the rights of the individual are at stake here and I do not think we should be prepared to say that we will forget this principle because the minister of the deputy minister says he will not have the personnel.

The Chairman: There is a principle involved in providing the appeal procedure itself.

Senator Walker: But the minister himself reviews it or can review it under the terms of the bill as originally submitted to us.⁸

From the point of view of the Department, it was assumed that the mooted review would be an outside one. S.B. Williams, Deputy Minister of Agriculture, responded in the Parliamentary Committee hearings that such a review "would be not only cumbersome, but costly as well", since it would necessitate engaging experts from outside of the Department of Agriculture, as well as the other ministries involved. Mr. Williams continued:

The applicants have every opportunity to present their entire case to the technical people and it is the technical people who make these judgments as to whether or not there should be registration.⁹

There does not appear to have been any concern during the discussions at the time of the passage of the P.C.P. Act that an outside review was necessary to ensure the technical soundness of a registration decision. The Commons Standing Committee on Agriculture accepted Mr. Williams' explanation that it would be cumbersome and costly to have a second decision on such a complex and technical issue. The Senate Committee persisted in holding out for the "principle", taking the view that an appeal was a "wholesome thing".

So, from the perspective of those who pushed for the opportunity to have a Review Board in the first place, the motivation appears to have been primarily ideological, or a point of principle. But the principle seems not to go beyond

providing that the appropriate decision-makers in Agriculture Canada move to refuse, cancel or suspend the registration of a pest control product only with the benefit a final submission by the applicant/registrant.

III. C. (3) Comparative Administrative Practice

Looking at the question from the point of view of administrative practice, there are many government decisions which are made without public hearings. These include decisions regarding questions of public health and the environment. For example, there is no formal procedure which the Minister of Fisheries follows in allocating fish quotas, although there are elaborate consultative mechanisms.¹⁰ Neither has the Minister of Health and Welfare traditionally held public hearings with respect to drug registration, although the Health Protection Branch is presently engaging in hearings, by invitation only, regarding the contraceptive drug Depo-provera.¹¹ It should be noted, however, that, in the fisheries context, before the Minister can revoke a licence, there must be a conviction for an offence under the Fisheries Act or Regulations. Hence there must be a hearing, at least with respect to the commission of the offence.

There are, both federally and provincially, many precedents for the holding of public hearings regarding environmental matters, particularly where difficult issues of risk-benefit assessment are concerned. Pursuant to the 1984 federal policy on environmental assessment and review, there must be public review by an Environmental Assessment Panel of a proposal where the environmental effects that may be caused are unknown or if "public concern is such that a public review is desirable".¹² Hearings must be held pursuant to the Northern Inland Waters Act before a licence is granted for the use of northern waters.¹³ Boards of Review are established under the authority of the Environmental Contaminants Act¹⁴ to

enquire into the nature and extent of the danger posed by a substance with respect to which the government proposes to make an order or a regulation.¹⁵ At the provincial level, there are numerous provisions for hearings on issues of environmental concern. The Ontario Environmental Appeal Board holds hearings under the Water Resources Act¹⁶ and the Pesticides Act.¹⁷ In this latter capacity, the Board hears appeals from decisions of the Director of the Pesticide Control Section of the Ministry of the Environment to refuse to issue or renew a licence, to suspend or revoke a licence, or to make, amend or vary a control order.¹⁸ The Environmental Assessment Board in Ontario conducts public hearings to assess proposals which pose an environmental risk, including projects for sewage and waste disposal and waterworks projects.¹⁹ The British Columbia Pollution Control Act provides for inquiries, if, in the opinion of the Director of Pollution Control or the Pollution Control Board, a "public or other inquiry" is necessary on any matter within the jurisdiction of the Board.²⁰ In Alberta, the Energy Resources Conservation Board conducts hearings in the course of environmental assessments under the authority of several pieces of legislation.²¹ These are only some examples of the use of public hearings to consider important environmental questions. Another process which is frequently adopted is to conduct public hearings is to refer such questions to royal commissions or public inquiries.²²

There are also numerous precedents in federal administrative decision-making for the holding of public hearings on licencing decisions, particularly where these involve significant elements of public interest. The C.R.T.C. holds public hearings with respect to broadcasting and telecommunications licencing, both for granting and revoking such licenses.²³ The National Energy Board is obliged to conduct a hearing for the holder of a certificate of public convenience and

necessity if the N.E.B. proposes to revoke or suspend the certificate.²⁴ As a matter of practice, the NEB holds public hearings on all "major" applications.²⁵ The CTC has made extensive use of formal hearings on all manner of licencing decisions, although there is presently a move to eliminate hearings on routine matters, with the development of a process of "file" hearings, and a reduction in the volume of hearings generally due to industry deregulation.²⁶ The Atomic Energy Control Board has held some public hearings in the course of licencing nuclear facilities.²⁷

This review is not much more than a bird's-eye recognition of the fact that some administrative decision-makers, dealing with questions of licencing, or with questions of human health and the environment, or with both, do engage in public hearings. It is fair to say that in administrative procedure it is more common to have a hearing to deal with licenses, especially with their revocation, than it is to deal with questions of health or the environment. In this sense the practice of administration mirrors, not surprisingly, the values established through common law of judicial review: i.e. that private interests have a higher claim on procedural "protections" than have public interests. That said, there is plenty of evidence that concerns about public health and the environment are being addressed through the holding of public hearings in some administrative decision-making contexts in Canada and that the ever-increasing demand for public participation incorporates a demand for such hearings.²⁸ There is, however, one further observation which should be made. So long as the decision remains a departmental one, in form Ministerial, the pressure to hold public hearings, from the standpoint of administrative practice, will not be so great as if the decision were being made by an independent (i.e. non-departmental, non-Ministerial) administrative agency or tribunal.

III. C. (4) The functional arguments for Review Boards

As for the need to hold hearings, and, in particular, to retain the Review Board, as a feature of making decisions with respect to the registration of pesticides, the issue must come back to the specific case -- to what is being sought to be achieved by the present process, and to what would be perceived to be missing if the provision for Review Boards were repealed. To begin, we must recall some basic features of the process. First, the process has gone on for fifteen years under the present regulatory scheme and for some time before that under the apparently capable technical and administrative control of officials in Agriculture Canada. Second, the process consists of gathering and assessing technical data. There are, however, important questions of policy and judgement which underlie decisions in individual cases. Third, the registrant/applicant has been an active participant in the process, with primary responsibility for the generation of data and in what might be called "continuous" contact with Agriculture Canada throughout. Fourth, the process is a protracted one; there must be time to generate and gather the necessary information. Fifth, the Review Board is insignificant in the process in terms of frequency of resort to such reviews. Sixth, the public has not traditionally been included, but more consultation is now taking place. Against this backdrop, and bearing in mind the legal problems identified earlier, there are two questions to be asked: (i) should the Review Board be retained?; and, (ii) if the Review Board is not to be retained, what, if anything is to be put in its place?

If the Review Board is to be retained, it must be for one or more of three reasons: (i) that it provides a reliable scientific review of the departmental decision; (ii) that it prevents or can correct unfair or arbitrary bureaucratic conduct; or, (iii) that it is a medium for public participation.

First, it seems highly improbable that an ad hoc panel, receiving evidence in a formal hearing over a relatively short span of time, can develop a better technical assessment of the relevant data than can expert public servants with time to gather, assess and react to data. The United States approach, which, by contrast with that followed in Canada, is adversarial and adjudicatory, has been criticized on the ground that it has encouraged regulators and the industry to take extreme positions, barring opportunities for compromise.²⁹

The second argument for Review Boards, and the one which appears to have informed the "principle" espoused by Senators in 1969 when s.5(d) of the P.C.P. Act was amended, is that a Review Board will ensure against official abuses. If that is the purpose of the Review Board, one might ask why a risk-benefit expert or a toxicologist is the most appropriate party to review what is effectively the "legality" of the decision. The Federal Court Trial Division is available to deal with abuses in Ministerial decision-making, not just with respect to cancellation, suspensions or refusals of registration, but at any stage of the process. A Review Board cannot be justified on the ground that an outside review is needed to protect against bureaucratic abuses.

The third possible justification for the existence of Review Boards is that they provide a medium for public participation. There are a number of things to be said with regard to this argument. First, in terms of access, two Boards in fifteen years, Boards which cannot be triggered by the public interest representatives and which have their mandate defined by the registrant/applicant, hardly constitute the kind of input or participation which health and environmental groups desire. Second, in the absence of departmental funding, which is not guaranteed to be available in future cases, the cost of participation in Review Board proceedings would be prohibitive. Third, the

public interest groups, as the process is presently constituted, arrive at the Review Board phase "cold". They have not had access to necessary information and have not been involved in the process until a Review Board is triggered by the request of the applicant/registrant. Fourth, returning to the question of cost and effective participation in the overall process of pesticide registration, the appearance, through counsel, is a fully formal proceeding, before an ad hoc decision-maker who has no direct involvement with the ongoing development of pesticide policy and who only makes recommendations to a Minister, can hardly be considered to be an effective opportunity to influence policy development. The opportunity comes too late in the process and it is too ad hoc.

Thus, the case for the continued existence of Review Boards is weak on the grounds of technical superiority, outside review or public participation. The case for abolishing them is strong. They cause problems of procedure due to the awkward institutional relationship to the Minister. They are costly and time-consuming. They provide only a facade of procedural legitimacy. If the Review Board in the alachlor proceedings has served one useful purpose it has been to bring about the release of information which had not previously been part of the data package. However, it is reasonable to suggest that this information was released because the registrant, Monsanto, was in a position of having its back to the wall. There is nothing unique to the process of the Review Board itself which compels the submission of more complete data. The Minister already has the power under section 19 of the P.C.P. Regs. to require further information on currently registered pesticides and has the power by section 18 to refuse registration in case of incomplete data. Ultimately the question of proprietary information and the release of industry data to the public is not directly related to the question of the utility of Review Boards.

III. D. What to Put in Place of Review Boards: Conclusions

At this point, the obvious question is to ask what, if anything, needs to be put in place of Review Boards. It was suggested above that it would be ill-advised to simply abolish Review Boards as a nuisance feature of due process. If the Boards are to be abolished, it can only be done in a positive spirit, identifying equivalent or even more constructive means of according to interested parties "an opportunity to be heard". In the end however, it may not be necessary to conceive an elaborate scheme to "take their place".

From the point of view of the property or commercial interest in the registration of a pest control product, it is unlikely that any explicit mechanism needs to be put in the P.C.P. Regs. in the place of the Review Board for the purpose of ensuring that an applicant/registrant has "an opportunity to be heard". As the process is presently constituted, the applicant/registrant is kept informed of "the case against it" and has an opportunity to respond. However, in the interest of avoiding a challenge on judicial review, and of avoiding the implications of abolishing the Review Boards, the Pesticides Directorate ought to ensure that a final opportunity to be heard, with full notice of the relevant issues, is given to the applicant/registrant before a decision to refuse, cancel or suspend registration is taken. This need not be an oral hearing; indeed, if it were an oral hearing, the Directorate would risk being drawn back into the spiral of increasingly formal expectations which has been triggered by the existence of Review Boards.

The problem of what to put in place of the Review Board to compensate for the public participation function is more problematic. Stated in terms of potential problems which might be raised through judicial review, the abolition of Review Boards is unlikely to give rise to successful challenges by public

interest groups, at least given the current development of the law; our doctrine of judicial review, as has been seen, has developed around the protection of rights. However, as the opportunities to participate which are given to registrant/applicants become more explicit, the impression that the process is "captured" or one-sided, to the exclusion of the public interest perspective, will be exacerbated. Furthermore, as public interest representatives are given more opportunities to participate in the process, even through the modest steps initiated in response to the Salter Report, there will be a heightened sense that they are affected parties by invitation, or that they play an "adversarial" role. As this level of participation increases, the likelihood of public interest representatives making a successful case on judicial review will increase.

In addressing the question of public participation, there are many options, from full participation in an adversarial process to membership on advisory bodies. The range of these options has been considered and fully canvassed in the Salter Report and the present Report is not intended to rehearse that debate. However, several observations can be made from the "legal" perspective of this Report. First, to do nothing about public participation is to invite the eventual (although probably not immediate) forcing of the process into an adjudicatory-adversarial mode through judicial review. Second, the adjudicatory model is more expensive; in the United States the direct cost to the government of pesticide regulation through adversarial proceedings is twenty times what it is in Canada, although the U.S. only regulates, at most, three times as many pesticides.³⁰ Third, the general trend in administration is to experiment with more flexible, informal procedures for decision-making. Fourth, Agriculture Canada has, in the Pest Management Advisory Board, an excellent opportunity to gain advice on public participation in the process of pesticide regulation,

without necessarily committing itself one way or the other in the inevitable debate. Moreover, it also has in the P.M.A.B. an existing, independent mechanism to administer new experiments in public participation, again without necessarily being seen to make a commitment to procedures which might otherwise lead into the spiral toward formality. Fifth, from a legal point of view, the major issue to be addressed in moving toward meaningful public participation is that of industrial information. In conclusion, what needs to be said above all on the question of public participation is that, sooner or later, either through political pressure or through judicially imposed procedures, the public will get to participate more fully in pesticide decision-making and Agriculture Canada ought to continue to treat the development of innovative and informal procedures for such participation as a matter of priority.

What must be emphasized in this proposal to abolish Review Boards as a component of the pesticide registration process is that this step is not one of retrenchment. It is not a rearguard action against the opening up of the process which Review Boards might, in a formal sense, be seen to represent. Instead of being a step to make the system more closed, it is one element of an ongoing process of rethinking the most effective and rational means to reach decisions which are technically sound, which are fair to affected parties, and which enhance the ability of the system to take account of the public interest and to hold public confidence.

The pesticide registration process in Canada is at a critical turning point. At the same time as a new initiative in consultation and policy development is being undertaken, the considerable shortcomings of a formal commitment to a judicial-type resolution of hard cases, on an ad hoc and infrequent basis, are being demonstrated. As a further coincidence, new demands for procedural justice

in administrative decision-making are being positively received by reviewing courts, either on common law or constitutional grounds. In order for Agriculture Canada to move away from the formal process of Review Boards and, at the same time, to avoid challenges from affected parties, there are two challenges. The first is to demonstrate to the parties that the process is responsive to them, that at least they do have an opportunity to be heard. The second will be, in the event that some party is not satisfied with the proffered process, to convey fully to a reviewing court the truly dynamic character of the pesticide registration system and the difficulty of forcing that decision-making process into a judicial mode.

As a bottom line, reviewing courts will need to be satisfied that parties affected by pesticide decisions are receiving notice of decisions and are being accorded an opportunity to be heard, in some fashion. In the recent instances of judicial review of pesticide decision-making, the Review Board has helped only to confirm the high expectations of formal decision-making. The alternative to formality is not so much informality as it is innovation, which might otherwise be expressed as a conscientious search for meaningful participation by all relevant parties. For the public that ought to mean an opportunity to have better information and to have input, particularly in the area of policy development. For the registrant/applicant, that ought to mean full warning of any concerns which are held by pesticides regulators and plenty of opportunity to respond to those concerns. The major legal challenge is to come to terms with the issue of proprietary information.

The overall challenge is to move away from a formal, but largely irrelevant, procedure and to replace it with a meaningful opportunity for interested parties to be informed of, to be consulted about and to participate in the pesticide

registration process.

Summary of Recommendations:

- (i) For the purposes of carrying out the recommendations of this Report, no change need be made in the P.C.P. Act. In the long run, however, the P.C.P. Act ought to be completely revised to establish a comprehensible legislative source for Canadian pesticide policy and its administration. Its present skeletal provisions are not acceptable.

- (ii) Section 20 of the P.C.P. Regs. should be amended to read:

The Minister may, on such terms and conditions, if any, as he may specify, cancel or suspend the registration of a control product when, based on current information available to him,

- (a) the merit or value for the purposes claim when the control product is used in accordance with its label directions; or
- (b) the risk or harm to
 - (i) things on or in relation to which the control product is intended to be used, or
 - (ii) public health, plants, animals or the environment;

is no longer acceptable to him.

This recommendation is to make section 20 of the P.C.P. Regs. consistent with sections 18 and 19.

- (iii) Section 21 of the P.C.P. Regs. should be amended to read:

Where the Minister

- (a) refuses to register a control product, or
- (b) cancels or suspends the registration of a control product,

he shall send to the applicant or the registrant, as the case may be, a notice by registered mail stating that

registration has been refused or cancelled and stating the reasons therefor.

This recommendation clarifies the status of a request for temporary registration or the extension thereof as regards the notice and review procedures. These procedures are available to all applicants, whether for temporary or "full" registration. They are, in any event, not substantially more than would be imposed by the common law of procedural fairness.

- (iv) Section 23 of the P.C.P. Regs. should be amended to read:

An applicant or registrant who has received a notice under section 21 may, within 30 days from the day on which the notice was received by him, apply in writing to the Minister to have the decision reconsidered. The applicant or registrant may submit with the request for reconsideration written comments upon the reasons given in the notice by the Minister, as well as any further information which the applicant or registrant wishes the Minister to consider.

This recommendation replaces the Review Board process with a departmental reconsideration, based on written submissions.

- (v) Section 24 of the P.C.P. Regs. should be repealed and replaced by:

Where, pursuant to section 23, the Minister receives a request to reconsider his decision, he shall respond by registered mail within 30 days of the receipt of the request stating the reasons for his response.

Agriculture Canada should consider whether the 30-day response-period is reasonable.

- (vi) Section 25 of the P.C.P. Regs. should be repealed.
- (vii) The process of exploring new avenues of consultation, begun by the Salter Report and by the creation of the Pest Management Advisory Board, should be continued. The objective ought to be greater public and industry

involvement in the development of pesticides policy, as well as public awareness of the status of, and access to data relating to, specific pest control products.

- (viii) In the development of new approaches to consultation with interested parties, formal, judicial-type proceedings should be avoided unless they are clearly superior to other less formal means of achieving the same degree of consultation or participation.

ENDNOTES, CHAPTER III

1. The P.C.P. Act ought to be considered as falling within the "reform initiative" announced by the Minister Responsible for Regulatory Affairs on March 6, 1986. (The initiative is one of forty-three which have been identified as a result of the Report of the Ministerial Task Force on Program Review.) According to the statement of March 6: "The Minister of the Environment is to undertake, as a matter of priority, a policy review of the steps needed to assure the coherence and adequacy of toxic and commercial chemicals policy, research procedure, data procurement, and regulatory controls at the federal and provincial level to protect human health and the natural environment."
2. A full discussion of this issue may be found at Chapter II, Part A.4, pp. 78 to 84, supra.
3. See: Chapter II, Part A.3 (ii), pp. 74 to 78, supra.
4. See: Chapter II, Part A.3 (i), pp. 69 to 74, supra.
5. See: Chapter II, Part A.2, pp. 44 to 69; and Chapter II, Part B, pp. 89 to 98, supra.
6. For examples of the use of the inclusio unius, exclusio alterius rule of interpretation to determine the elements of natural justice or procedural fairness, see: Law Society of Upper Canada v. French [1975] 2 S.C.R. 767; Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police [1979] 1 S.C.R. 311 (Martland J., dissenting).
7. Senates Standing Committee on Banking, Trade and Commerce, Proceedings, 1968-69, No. 30, March 30, 1969, p. 6. Senator Hayden, Chair.
8. Ibid., at 6-7.
9. House of Commons, Standing Committee on Agriculture, Proceedings, 1968-69, No. 18, February 11, 1969, p. 598-99.
10. See: D. VanderZwaag, "Canadian Fisheries Management: A Legal and Administrative Overview" (1983), 13 Ocean Development and International Law 171.
11. Although the failure to make the hearings fully public, including the appointment of "lay" members to the hearing panel and the financing of public interest groups, has been criticized. "Government under fire over closed hearings on contraceptive drug" Globe and Mail, July 17, 1986, p. A-8.
12. Environmental Assessment and Review Process Guidelines, SOR 84-467, ss. 12(d), 13, and 20.

13. Northern Inland Waters Act, R.S.C. 1970 (1st Supp.) c. 28, s. 15(2). See also: Northern Pipeline Act, S.C. 1978, c. 20, s. 42.
14. Environmental Contaminants Act, S.C. 1974-75, c. 72, s. 6.
15. See the Report on Outside Review and Public Participation by the Environmental Contaminants Board of Review (P.C.B.).
16. R.S.O. 1980, c. 361.
17. R.S.O. 1980, c. 376.
18. See G. Patterson, "Practice and Procedures Before the Ontario Environmental Appeal Board" (1982), 3 Advocates' Quarterly 181.
19. Pursuant to the Water Resources Act, supra, note 16; and the Environmental Protection Act, R.S.O. 1980, c. 141. See: B. Smith "Practice and Procedure Before the Environmental Assessment Board" (1982), 3 Advocates' Quarterly 195. The Board also participates in joint hearings with the Ontario Municipal Board under the Consolidated Hearings Act, S.O. 1981, c. 20. See: M.I. Jeffery, "Procedural Safeguards in the Context of Ontario Municipal Board and Environmental Assessment Board Hearings" (1984), 5 Advocates' Quarterly 23.
20. R.S.B.C. 1979, c. 332, s. 17.
21. For a review of the environmental assessment process conducted by the E.R.C.B., see: P.S. Elder "Environmental Impact Assessment in Canada" (1985) 23 Alta. L.R. 286.
22. Cluff Lake Board of Inquiry: Final Report (1978), Saskatchewan, Chairman, Mr. Justice E.D. Bayda, (Nuclear Development); Report of the MacKenzie Valley Pipeline Inquiry (1977) (Ottawa: Supply and Services) Chairman, Mr. Justice T.R. Berger; Report of the Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario (1984) (Ontario: Ministry of the Attorney General) Chairman, J. Stefan Dupre.
23. The Canadian Radio-Television and Telecommunications Commission Act, S.C. 1974-75-76, c. 49, s. 11.
24. National Energy Board Act, R.S.C. 1970, c. N-6, s. 47.
25. Lucas and Bell, The National Energy Board: Policy Procedure and Practice, a study paper prepared for the Law Reform Commission of Canada (Ottawa: Supply and Services, 1977) at 55.
26. For a description of the process of the C.T.C., albeit one which has been somewhat overtaken by the process of deregulation, see H.N. Janisch, The regulatory Process of the Canadian Transport Commission, a study paper prepared for the Law Reform Commission of Canada (Ottawa: Supply and Services, 1978).

27. See a description of the Point Lepreau hearings in Salter and Slaco, Public Inquiries in Canada (1981), at 47-63. A public hearing was not held in the decision to grant a renewed operating licence to Ontario Hydro for its Pickering B reactor. See: Energy Probe v. Atomic Energy Control Board et al. (1984), 5 Admin. L.R. 165 (F.C.T.D.), aff'd 1984, 11 Admin. L.R. 287 (Fed. C.A.).
28. See: Public Participation in Environmental Decision-making: Strategies for Change, Proceedings of a National Workshop, Environmental Council of Alberta (1979); J.F. Castrilli and T. Vigod, Pesticides: An Examination of Canadian Law and Policy, a study paper prepared for the Law Reform Commission of Canada (Draft Only) (1983); T.F. Schrecker, Political Economy of Environmental Hazards, a study paper prepared for the Law Reform Commission of Canada (1984).
29. Pijawka, "A Comparative Study of the Regulation of Pesticide Hazards in Canada and the United States" Ph.D. Thesis, Clark University, 1983. Reproduced by University Microfilms International, at 36-37.
30. Ibid., at 204.

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